

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





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## TRANSCRIPT OF RECORD

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United States Court of Appeals for the  
District of Columbia

OCTOBER TERM, 1939.

No. 7548

562

ERNEST HUBER, PETITIONER,

*vs.*

GUY T. HELVERING, COMMISSIONER OF INTER-  
NAL REVENUE.

PETITION TO REVIEW DECISION OF THE UNITED STATES BOARD OF  
TAX APPEALS

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FILED NOVEMBER 15, 1939

PRINTED DECEMBER 11, 1939

# United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1939.

No. 7548

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ERNEST HUBER, PETITIONER,

*vs.*

GUY T. HELVERING, COMMISSIONER OF INTER-  
NAL REVENUE, RESPONDENT.

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PETITION TO REVIEW DECISION OF THE UNITED STATES BOARD OF  
TAX APPEALS

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ERNEST HUBER, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

*Appearances*

For Taxpayer: George D. Brabson, Esq., J. G. Korner, Jr., Esq.

For Comm'r.: E. M. Woolf, Esq.

*Docket Entries*

1938

Mar. 24—Petition received and filed. Taxpayer notified.  
(Fee paid)

“ 24—Copy of petition served on General Counsel.

May 16—Answer filed by General Counsel.

“ 16—Request for Circuit hearing in Washington, D. C.  
filed by General Counsel.

“ 23—Notice issued placing proceeding on Washington,  
D. C. calendar. Service of answer and request  
made.

1939

Jan. 11—Hearing set Feb. 23, 1939.

Feb. 21—Motion for a continuance to March 2, 1939 filed  
by taxpayer.  
2/21/39. Granted.

Mar. 2—Hearing had before Mr. Leech on merits. Sub-  
mitted. Stipulation of facts filed. Petitioner's  
brief due 3/31/39—respondent's 5/1/39—reply  
5/16/39.

“ 13—Transcript of hearing March 2, 1939 filed.

“ 30—Brief filed by taxpayer. 3/30/39 copy served.

May 1—Brief filed by General Counsel.

“ 15—Reply brief filed by taxpayer. 5/16/39 copy  
served



- May 26—Memorandum opinion rendered, J. Russell Leech, Div. 6. Decision will be entered for the respondent.
- “ 29—Decision entered, J. Russell Leech, Div. 6.
- Jun. 3—Motion for reconsideration and reargument filed by taxpayer.
- “ 3—Order that oral argument will be heard by Division 6 on June 12, 1939 at 10 o'clock in one of Board's hearings rooms in Washington, D. C. entered.
- “ 12—Hearing had before Mr. Leech on motion of petitioner for reconsideration of Memorandum Opinion and decision. Trial memorandum filed.
- “ 22—Transcript of hearing of June 12, 1939 filed.
- Jul. 13—Order that motion for reconsideration be denied, entered.
- Oct. 6—Stipulation of venue filed.
- “ 6—Petition for review by U. S. Court of Appeals of the District of Columbia with assignments of error filed by taxpayer.
- “ 6—Proof of service filed.
- Nov. 4—Praecipe for record filed with proof of service thereon.

2 Endorsed: United States Board of Tax Appeals  
Filed Mar 24 1938

United States Board of Tax Appeals

Docket No. 92701

ERNST HUBER, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

*Petition*

The above named petitioner hereby petitions for a re-determination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT: B:-1-MMR:90D), dated February 7, 1938, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with place of residence at Long Hill, Connecticut. The returns for the periods here involved were filed with the Collector of Internal Revenue for the District of Connecticut.

2. The notice of deficiency, a copy of which is attached and marked Exhibit A, was mailed to the petitioner on February 7, 1938.

3. The taxes in controversy are income taxes for the calendar years 1933 and 1934 as follows:

|      |            |
|------|------------|
| 1933 | \$1,105.00 |
| 1934 | 1,084.11   |

The entire amount of said deficiencies is in dispute.

4. The determination of taxes set forth in said notice of deficiency is based upon the following errors:

3 (a) The Commissioner in determining that the adjusted income other than dividends of the Ernst Huber Trust for the years in question, was taxable to the petitioner.

(b) The Commissioner erred in determining that the dividends from the Ernst Huber Trust during the years in question were includible in petitioner's income and taxable to him.

(c) The Commissioner erred in holding that the transfer and assignment by the petitioner at the beginning of each year in question of all his interest in the Trust which was to be earned by the Trust in that year did not operate as an amendment or addition to the Trust principal, nor create a new trust as to such property, and hence was taxable income to petitioner.

(d) The Commissioner erred in holding that the assignments by petitioner of his interest in the Trust distributions for the years in question did not constitute an irrevocable trust of said distributions.

5. The facts upon which petitioner relies as the basis of his proceeding are as follows:

(a) Under date of March 4, 1931, the petitioner Ernst Huber created by a deed a voluntary irrevocable trust under the laws of the State of Connecticut known as the Ernst Huber Trust. Under the terms of said Trust the grantor conveyed certain properties irrevocably to the Bridgeport-City Trust Co. as Trustee for certain named beneficiaries, reserving to himself the right to receive the net income from said trust properties during his life time. Said Deed of Trust was in all respects irrevocable and deprived petitioner of all his right, title and interest



4 in and to said properties with the exception of the net income therefrom for his life. A copy of said Trust Deed is hereby tendered in evidence and will be produced at the hearing.

(b) On or about December 31, 1932, the petitioner increased the principal amount of said Trust, or created a new and irrevocable trust, by transferring and assigning to the Trustee all of his interest in said Trust which was earned or accrued to that date. On March 18, 1933, and before any income was earned or accrued upon the Trust properties, the petitioner again increased the principal amount of said Trust, or created a new and irrevocable trust, by transferring and assigning to the Trustee, subject to the terms and conditions of the original Trust, all of his interest in the Trust which was earned or accrued from that date up to March 4, 1934.

(c) On March 3, 1934, the petitioner again increased the principal of said Trust, or created a new and irrevocable trust by transferring and assigning to the Trustee, subject to the same terms and conditions of the original Trust, all of his interest in the Trust which was earned or accrued from that date up to March 4, 1935.

(d) Petitioner avers that the several assignments above referred to were in writing, were accepted by the Trustee as constituting irrevocable assignments of trust property, were so designated and denominated by the Trustee on its books and records, and that the property so assigned was treated by the Trustee thereafter as constituting a part of the Trust principal, and said property has been added to the principal of said Trust, and is being held for  
5 the use and benefit of the beneficiaries thereof, to-wit, the wife and children of the grantor.

(e) Petitioner avers that no part of said property so assigned and transferred by petitioner to the Trustee as aforesaid, has been received by petitioner or credited to him or his account in any way, and that petitioner has not and will not receive the benefit of said property so assigned and transferred by him.

(f) Petitioner avers that no part of said property so assigned and transferred in trust by petitioner to the Trustee has been distributed or disbursed by the Trustee but has been added to and forms a part of the Trust Estate.

WHEREFORE, petitioner prays that the Board may hear the proceeding and find that the Commissioner was in error in including said sums or any part of the income or distributions of said Trust in the petitioner's income during the years in question, or that said sums were taxable to petitioner, and that the Board determine that there is no deficiency against the petitioner for either of the years in question.

GEORGE D. BRABSON  
J. G. KORNER, JR.  
404 Transportation Bldg.  
Washington, D. C.

Of Counsel

DAVID H. BLAIR  
RICHARD S. DOYLE

6 STATE OF CONNECTICUT  
County of ss.

Ernst Huber, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

ERNST HUBER

Subscribed and sworn to before me this 21st day of March, 1938.

CLIFTON A. PORTER  
Notary Public

(Seal)

7 COPY  
Exhibit A

February 7, 1938

IT:B:1

MMR:90D

Mr. Ernst Huber,  
Long Hill, Connecticut.

Sir:

Your are advised that the determination of your income tax liability for the taxable years ended December 31, 1933 and 1934 discloses a deficiency of \$2,189.11 as shown in the statement attached.



In accordance with section 272(a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, and section 272(a) of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT: C:P-7. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,  
*Commissioner.*

By (Signed) CHAS. T. RUSSELL  
*Deputy Commissioner.*

Enclosures:  
Statement  
Form 870  
MMR/DR-3  
8  
IT:B:1  
MMR-90D

*Statement*

In re: Mr. Ernst Huber,  
Long Hill, Connecticut.

Tax Liability for Taxable Years Ended  
December 31, 1933 and 1934

Income Tax Liability

| Year   | Liability         | Assessed          | Deficiency        |
|--------|-------------------|-------------------|-------------------|
| 1933   | \$4,717.30        | \$3,612.30        | \$1,105.00        |
| 1934   | 1,634.20          | 550.09            | 1,084.11          |
| Totals | <u>\$6,351.50</u> | <u>\$4,162.39</u> | <u>\$2,189.11</u> |



In making this determination of your income tax liability, careful consideration has been given to the internal revenue agent's report, dated July 18, 1936, to your protests dated November 25, 1935 and October 14, 1936 and to the statements made at the conference held January 8, 1937.

A copy of this letter and statement has been mailed to your representative, Mr. John F. Prinzing, First National Bank Building, Bridgeport, Connecticut, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

### Adjustments to Net Income

#### Taxable Year Ended December 31, 1933

|                                               |             |
|-----------------------------------------------|-------------|
| Net income ordinary, as disclosed by return   | \$20,993.76 |
| Unallowable deductions and additional income: |             |
| (a) Income from fiduciary                     | 4,329.03    |
| (b) Dividends from fiduciary                  | 3,347.49    |
|                                               | <hr/>       |
| Net income ordinary, adjusted                 | \$28,670.28 |

### 9 Explanation of Adjustments

(a) This represents adjusted income, other than dividends, of the Ernst Huber Trust, which is held to be taxable to you since, under paragraph 14 of the trust indenture, you surrendered your right to alter, amend or modify the trust agreement and, in addition it is held that your letter dated March 8, 1933, instructing the trustee to make transfer of the income of the trust to the principal thereof does not create a new irrevocable trust with respect to the income received by the trust for the period of time mentioned.

(b) Dividends received from the Ernst Huber Trust have been included in income for the reason stated under item (a).

### Computation of Tax

|                                  |             |
|----------------------------------|-------------|
| Net income adjusted, ordinary    | \$28,670.28 |
| Less:                            |             |
| Dividends                        | \$14,304.49 |
| Personal exemption               | 2,500.00    |
| Credit for dependents            | 1,200.00    |
|                                  | <hr/>       |
| Net income subject to normal tax | \$10,665.79 |

|                                       |            |
|---------------------------------------|------------|
| Normal tax at 4% on \$4,000.00        | \$ 160.00  |
| Normal tax at 8% on \$6,665.79        | 533.26     |
| Surtax on \$28,670.28                 | 1,280.43   |
| 12½% of \$21,966.91, capital net gain | 2,745.86   |
|                                       | <hr/>      |
| Total tax                             | \$4,719.55 |
| Less:                                 |            |
| Tax paid at source                    | 2.25       |
|                                       | <hr/>      |
| Income tax liability                  | \$4,717.30 |
| Income tax assessed, account #214041  | 3,612.30   |
|                                       | <hr/>      |
| Deficiency of income tax              | \$1,105.00 |

#### 10                      Adjustments to Net Income

Taxable Year Ended December 31, 1934

|                                               |             |
|-----------------------------------------------|-------------|
| Net income disclosed by return                | \$16,489.77 |
| Unallowable deductions and additional income: |             |
| (a) Income from fiduciary                     | 4,372.71    |
| (b) Dividends from Fiduciary                  | 3,940.88    |
|                                               | <hr/>       |
| Total                                         | \$24,803.36 |
| Nontaxable income and additional deductions:  |             |
| (c) Additional capital loss                   | .65         |
|                                               | <hr/>       |
| Net income, adjusted                          | \$24,802.71 |

#### Explanation of Adjustments

(a) and (b). For explanation see items (a) and (b) of adjustments made for the year 1933.

(c) Loss of \$1,999.35, shown on your return from sale of capital assets, has been increased to \$2,000.00, the total loss to which you are entitled under section 117(d) of the Revenue Act of 1934, due to the allowance to you of capital losses claimed by the Ernst Huber Trust.

#### Computation Tax

|                             |             |
|-----------------------------|-------------|
| Net income adjusted         | \$24,802.71 |
| Less:                       |             |
| Personal exemption          | \$2,500.00  |
| Credit for dependents       | 1,200.00    |
|                             | <hr/>       |
| Balance (Surtax net income) | \$21,102.71 |

Less:

|                                             |             |           |
|---------------------------------------------|-------------|-----------|
| Dividends                                   | \$14,605.45 |           |
| Earned income credit (10% of<br>\$9,525.00) | 952.50      | 15,557.95 |

Net income subject to normal tax \$ 5,544.76

11 Normal tax at 4% on \$5,544.76 \$ 221.79  
Surtax on \$21,102.71 (amount in excess of  
\$4,000.00) 1,425.41

Total Tax \$1,647.20

Less:

Income tax paid at the source 13.00

Correct income tax liability \$1,634.20

Income tax assessed, original account #211990 550.09

Deficiency of income tax \$1,084.11

MMR/AEB-2

12 Endorsed: United States Board of Tax Appeals  
Filed May 16 1938

Endorsed: Received May 16 1938 U. S. Board of Tax  
Appeals

United States Board of Tax Appeals

Docket No. 92701

ERNST HUBER, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

*Answer*

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.



4. (a) Admits that the Commissioner has determined that the adjusted income other than dividends of the Ernst Huber Trust for the taxable years 1933 and 1934 was taxable to the petitioner. Denies that the Commissioner thereby erred and denies all other allegations of fact contained in sub-paragraph (a) of paragraph 4 of the petition.

13 (b) Admits that the Commissioner has determined that the dividends received from the Ernst Huber Trust for the taxable years 1933 and 1934 were includible in petitioner's income and taxable to him. Denies that the Commissioner thereby erred and denies all other allegations of fact contained in sub-paragraph (b) of paragraph 4 of the petition.

(c) and (d) Denies that the Commissioner erred as alleged in sub-paragraphs (c) and (d) of paragraph 4 of petition.

5. (a) Admits that under date of March 4, 1931, the petitioner created an irrevocable trust known as the Ernst Huber Trust. Admits that under the terms of said trust the petitioner reserved to himself the right to receive the net income from the trust properties during his life time. Denies all other allegations contained in sub-paragraph 5 of the petition.

(b), (c), (d), (e) and (f) Denies the allegations of fact contained in sub-paragraph (b), (c), (d), (e) and (f) of paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinabove admitted, qualified or denied.

Wherefore, it is prayed that the Board redetermine the correct amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, viz., \$1,105.00 for the taxable year 1933 and  
14 \$1,084.11 for the taxable year 1934.

(Signed) J. P. WENCHEL,

GWK

Of Counsel:

F. R. SHEARER,

*Chief Counsel,*

E. M. WOOLF,

*Bureau of Internal Revenue.*

*Special Attorneys,*

*Bureau of Internal Revenue.*

15

## United States Board of Tax Appeals

ERNEST HUBER, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Docket No. 92701.

George D. Brabson, Esq., and J. G. Korner, Jr., Esq., for the petitioner.

E. M. Woolf, Esq., for the respondent.

*Memorandum Opinion.*

Leech: This proceeding seeks redetermination of deficiencies in income tax of \$1,105 and \$1,084.11 for the calendar years 1933 and 1934, respectively. Both deficiencies arise through the increase of petitioner's reported income in each year by the amount of the income derived in each such year by a trust created by petitioner.

We find the facts as stipulated by the parties. Briefly these are that petitioner, a resident of Long Hill, Connecticut, on March 4, 1931, created a trust with the Bridgeport City Trust Company as trustee and conveyed certain securities to the trustee to be held and administered as such. The trust instrument provided that all income of the trust was to be paid currently to the petitioner for the term of his life. At his death the corpus was to be administered, under certain trusts, for his wife and children. The trust was irrevocable but petitioner, as grantor, reserved the power, in case his wife and children predeceased him, to designate new beneficiaries of the remainder interests "not including himself".

The trust instrument carried what is commonly known as a "spendthrift clause" in the following words:

Neither the principal nor the income of the trust funds shall be liable for the debts of any beneficiary hereof, nor shall the same be subject to seizure by any creditor of any beneficiary under any writ or proceeding at law or in equity, and no beneficiary hereunder shall have any power to sell, assign, transfer, encumber or in any other manner to anticipate or dispose of his or her interest in the trust funds or the income produced thereby.



Petitioner, as grantor, reserved the power under certain conditions to evade the corpus, this provision reading:

If, in any year during the Donor's lifetime (year meaning each twelve months commencing with the date hereof) the net income does not equal the sum of Ten Thousand Dollars (\$10,000) the Donor shall, if he so requests, be paid from the principal such amount as added to the net income will make a total of Ten Thousand Dollars; any such payment of principal, however, shall be cumulative, and shall be paid back to the principal out of excess net income over the sum of Ten Thousand Dollars as and when available in the subsequent year or years.

On March 18, 1933, the petitioner wrote the Bridgeport City Trust Company, as trustee, as follows:

This is to instruct you to make the following transfers from income to principal during the fiscal year, ending March 4th, 1934:

Balance of income June 4, 1933

Balance of income Sept. 4, 1933

Balance of income Dec. 4, 1933

Balance of income Mar. 4, 1934

These amounts, when so transferred, are to become a part of the principal of the fund and are to be deposited in your Savings Department.

16 On March 3, 1934, petitioner wrote an identically similar letter to the trustee with respect to the balances of income accruing at the close of the four quarters of the fiscal year ending March 4, 1935.

In accordance with these directions, the trustee transferred to corpus of the trust the income in each year, which aggregated the sum of \$7,676.52 for the year 1933 and \$8,313.59 for the year 1934. In determining the deficiencies respondent included these amounts in petitioner's income for the respective years as taxable to him.

Petitioner contends that the two letters of direction to the trustee by him constituted final and irrevocable assignments to the trustee, as such, of his right to receive income of the trust for the two years in question and that the case is ruled by *Blair v. Commissioner*, 300 U. S. 5. Respondent's contention is that the directions to the trustee to credit income to corpus at stated intervals constituted a mere as-



signment of such income and that the question is ruled by *Corliss v. Bowers*, 281 U. S. 376.

Had it been the intention of petitioner to irrevocably assign to the trustee his right to receive income from the trust for the two years in question, it would have been a very simple matter for him to express that intent in the letters in question. These letters, however, are identically worded and appear to be nothing more than directions to the trustee as to the payment over at certain stated periods of the income then realized and distributable to petitioner. These directions were subject to change or cancellation at any time by petitioner. The directions provided that the amounts shall become part of the corpus of the trust "when so transferred". Each transfer is to be made after the earnings accrue and, in the absence of such direction, would be paid to petitioner. Thus these letters seem to contain only mere directions to the trustee for the transfer of future income. *Gerald A. Eubank*, 39 B. T. A.—, (No. 76).

It is unnecessary, however, to base the decision of the question upon that conclusion. The trust instrument carries a broad and very specific spendthrift clause which is set out above. Under this provision, no beneficiary shall sell, assign, transfer, encumber or in any other manner anticipate or dispose of his or her interest in either corpus or income. It is clear that this provision applies fully to petitioner as the primary beneficiary entitled to the income from the corpus for the term of his life. In the recent case of *Clarence P. Byrnes*, 39 B. T. A. —, (No. 77), we had a question similar to that here involved and on practically identical facts. There an actual assignment was executed but, in holding this invalid as a transfer of the right to receive income and as effecting only a transfer of that income after it accrued and was payable to the assignor, we said:

Prior to the attempted assignment, there can be no doubt that the income, when and as paid over to petitioner, constituted income taxable to him. *Michael Fay et al., Executors*, 34 B. T. A. 662. Cf. *Irwin v. Gavit*, supra. Therefore, since the attempted assignment was without legal effect, and the trust income in controversy had to become petitioner's income before he could dispose of it, it was taxable to him in the same manner and to the same extent as if such assignment had never been executed. \* \* \*

We are unable to accept the argument of petitioner's counsel that he may not be considered a beneficiary of the trust in contemplation of the spendthrift clause. That clause is specific in its application to all beneficiaries. Petitioner could have availed himself of the protection of this provision and, consequently, is bound by its terms.

Thus, we think the present case is ruled by *Clarence P. Byrnes, supra*. Aside from any question as to their formal sufficiency as assignments, the two letters of direction from petitioner to the trustee could not have effected a transfer to the trustee of petitioner's right to receive income of the trust during the two taxable years. The determination necessarily follows that this income was transferred to corpus only after petitioner became entitled to receive it and, accordingly, it is taxable to him.

*Decision will be entered for the respondent.*

Entered: May 26, 1939.

(Seal)

18 United States Board of Tax Appeals  
Washington

Docket No. 92701.

ERNST HUBER, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

*Decision*

Pursuant to the determination of the Board, as set forth in its Memorandum Opinion entered May 26, 1939, it is

ORDERED and DECIDED: That there are deficiencies in income tax for the calendar years 1933 and 1934 in the respective amounts of \$1,105 and \$1,084.11.

(Signed) J. RUSSELL LEECH.

(Seal)

*Member.*

Entered May 29 1939



19       Endorsed: United States Board of Tax Appeals  
Filed Jun 3 1939

United States Board of Tax Appeals

Docket No. 92701

ERNST HUBER, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

*Motion for Reconsideration and Reargument*

Now comes the petitioner, by his attorneys of record, and respectfully moves the Board to reconsider the Opinion promulgated herein under date of May 26, 1939, and the final order of the Board entered May 29, 1939, and to permit counsel to reargue this case in view of the errors hereinafter specified, and in support of this motion respectfully represents:

Counsel for petitioner earnestly request reconsideration by the Board Member of the Memorandum Opinion promulgated herein, in view of two errors in the Board's opinion which counsel believe will become obvious and apparent to the Board upon a careful rereading of the Trust Instrument here involved in connection with the authorities cited herein.

The Opinion of the Board is based primarily upon the assumption that Mr. Huber, the taxpayer, was *one* of the *beneficiaries* included under the spendthrift clause contained in Article Sixth of the Trust Instrument, and therefore the Board concluded that the taxpayer was restricted from assigning his interest in the trust. But upon sound reflection the Board Member must see that that assumption is untrue. Mr. Huber, the taxpayer, clearly was *not* included as one of the beneficiaries under Article Sixth. A careful reading of Article Sixth shows that its *sole purpose* was to protect the taxpayer's wife and children as beneficiaries from having their interest in the trust levied upon or sequestered for the debts of their creditors. Article Sixth reads as follows:

20       "Neither the principal nor the income of the trust funds shall be liable for the *debts* of any *beneficiary* hereof, nor



shall the same be subject to seizure by any *creditor* of any beneficiary under any writ or proceeding at law or in equity", etc.

The sole question is—was Mr. Huber one of the beneficiaries contemplated by Article Sixth? That is a question of intent, to be derived from the construction of Article Sixth as well as the entire Trust Instrument.

Since Article Sixth was contemplated and designed to protect the interest of the *beneficiaries* of the trust from the debts or claims of creditors, it is apparent that Mr. Huber would not attempt to include himself as a beneficiary *unless he could legally and equitably do so*. The law will never impute an illegal motive. The first question we must ask, therefore, is—could Mr. Huber legally or equitably include himself as one of the beneficiaries contemplated by Article Sixth?

Now, it is perfectly manifest that Mr. Huber could put neither the principal nor the income of the trust out of reach of *his* creditors by means of a trust or by any other device, as long as he retained any right to either principal or income. The law will never enforce an instrument  
21 designed to escape one's just debts. *Williston on Contracts*, Sec. 1739.

For that reason a *donor* of trust property simply *can not* make himself the beneficiary of a spendthrift clause to *protect himself* from creditors. The rule is stated in 65 *C. J. Trusts*, Sec. 27, as follows:

"A spendthrift trust for the benefit of the donor during life is *invalid*, both as to past and future creditors, even though there is a provision for a contingent remainder in a third person; which rule applies to trusts created by women in contemplation of marriage, or settlement of property after marriage. This rule can not be evaded by giving the trustees unlimited discretion as to the use of such property."

This is the rule stated in *McColgran v. Magee*, 155 Pac. 995, 172 Cal. 182; *Carter v. American Trust Co.*, 147 N. E. 158, 82 Ind. A. 587; *Brown v. MacGill*, 87 Md. 161, 39 L. R. A. 806; *Forbes v. Snow*, 140 N. E. 418, 245 Mass. 85; *Stephens v. Moore*, 249 S. W. 601, 298 Mo. 215; *Mackason's Appeal*, 42 Penna. 330, 82 Am. Dec. 517; *Ford v. Caldwell*, 22 S. C. L. 282.

These courts have held flatly and squarely that:

One can not create a spendthrift trust out of his own property for his own benefit. *Mackason's Appeal, supra; Taylor v. Buttrick*, 165 Mass. 547, 52 A. S. R. 530.

A trust to place one's property beyond the reach of creditors, while retaining full enjoyment of the income through the instrumentality of a trustee, can not be created by any person. *Brown v. MacGill, supra*.

The rule is stated in 25 *R. C. L., Spendthrift Trusts*, Sec. 6, that:

22        "The general rule is that an owner of property, whether he is or is not a spendthrift, can not dispose of his property in trust or otherwise in such a manner as to exempt it from liability for his lawful debts, and therefore where the owner of property, even though he is in fact a spendthrift, conveys the same in trust for his own use and benefit, the conveyance, while valid as to the grantor, is absolutely *void as to existing or subsequent creditors*."

"This rule is based not upon technical grounds, but upon sound reasons of public policy." *Nolan v. Nolan*, 218 Pa. St. 135, 12 L. R. A. (N. S.) 369.

"To permit the creation of trusts *for the benefit of the donor* would revolutionize the credit system entirely, destroy all faith in the apparent ownership of property, and repeal all statutes and decisions against frauds. Every man about to engage in business where there was a chance of loss would place himself under the pupillage of trustees, and everybody's estates would be passed under settlement deeds and trustee's accounts through the courts." 25 *R. C. L. Spendthrifts*, Sec. 6, citing *Mackason's Appeal, supra*.

In 25 *R. C. L., Spendthrifts*, Sec. 7, the doctrine is carried a step further under the heading, "Prerequisites to Creation of Spendthrift Trusts", and it is there said:

"In order to create a spendthrift trust certain prerequisites must be observed, to wit, first the gift to the donee must be only of income" \* \* \*

Now a man can not be both donor and donee in the same transaction, so it is perfectly manifest that the beneficiary of a spendthrift trust must be some person *other than the donor*.

And, further, in the same section:



“Where the entire disposition of property is within the control of the beneficiary, no spendthrift trust arises or is created, and the donee’s interest may be sold under execution or sequestered in equity.”

In other words, if the Board should hold that Mr. Huber was included as one of the beneficiaries under Article 23 Sixth, then no spendthrift trust could have arisen, because it is obvious that Mr. Huber “controlled the entire disposition of the property”. There are hundreds of cases supporting this proposition of law which forbids a beneficiary of a trust to have any control over property set aside under a spendthrift clause. See 25 *R. C. L., Spendthrifts*, Sec. 6, and the notes thereto.

We respectfully urge and request the Board Member to consult 25 *R. C. L., Spendthrifts*, Secs. 4, 6 and 7, so that the Board Member can see for himself how clearly and completely the doctrine of a spendthrift trust rules out and *eliminates the donor from coming within its benefits*. It is manifest from the discussion there that a valid spendthrift trust contemplates only *third persons* as the beneficiaries, and *never* contemplates or includes the *donor* as a beneficiary, for clear reasons of public policy.

In a word, we can summarize the whole doctrine of spendthrift trusts in three short propositions, to wit:

1. A spendthrift trust is the placing of property in trust by the owner thereof, the income from which is set aside for the use and benefit of *another*, who is restricted by its terms from disposing of it or subjecting it to his or her debts prior to its actual receipt. *Bouvier Law Dictionary*, page 1124.

2. The owner of property can not create a spendthrift trust of his own property for his own benefit. 25 *R. C. L., Spendthrifts*, Secs. 4 and 6.

24 3. If a beneficiary of a trust has or is given any control over the property no spendthrift trust arises or is created, 25 *R. C. L., Spendthrifts*, Sec. 7.

Applying the foregoing principles to this case, we think there can be no doubt:

1. That Mr. Huber, being the owner of the trust property, could not possibly have created a spendthrift trust for his own benefit.



2. That Mr. Huber could not by means of a spendthrift trust or by any other device put his property beyond the reach of his creditors.

3. That since the sole purpose of Article Sixth was to put the trust property and trust income out of the reach of creditors of the beneficiaries, therefore Mr. Huber clearly did not intend to include himself as one of those beneficiaries, because he was prohibited by law from doing so.

### *Other Evidences of Intent of the Donor*

So far we have considered Article Sixth only. But there are other and abundant evidences in the Trust Instrument which show with equal clearness that Mr. Huber did not classify himself as one of the beneficiaries of the trust. And, of course, the intent of the donor must be gathered from the entire instrument.

We have pointed out in petitioner's reply brief four other places in the Trust Instrument where the taxpayer used the words "donor" and "beneficiaries" in obvious contra distinction, making it perfectly clear that he  
 25 regarded his wife and children as the beneficiaries, and never put himself into that category. We frankly can not understand how the language in Article Eighth, Article Twelfth and Article Fourteenth can possibly be misconstrued or misunderstood! For example, in Article Twelfth we find this:

"The trustee may resign from the trusts hereby created at any time by giving thirty days written notice \* \* \* to the *Donor* herein, or to the beneficiaries, if the *Donor* is deceased", etc.

The words "donor" or "beneficiaries" are used in such clear contrast with each other and are separated by the disjunctive "or," that the meaning is unescapable. Mr. Huber was not a beneficiary under the trust if the English language still makes sense.

Again, in Article Fourteenth we find this:

" \* \* \* that if all the *beneficiaries herein named or described* should predecease the Donor, then the Donor shall have the power of appointing *other beneficiaries*, not including himself; \* \* \* "

That provision (aside from the matter of construction thereof) shows clearly that Mr. Huber recognized that he could not validly appoint himself a beneficiary because to do so would not only destroy the irrevocable character of the trust, but would also render the spendthrift clause void.

It is elementary that the intention of the donor of a trust must be ascertained from the entire instrument and not from a single part. We are profoundly convinced that the Board Member will recognize the error contained in his previous opinion that Article Sixth included the petitioner as one of the beneficiaries, and that “petitioner could have availed himself of the protection of this provision and consequently is bound by its terms.”

We simply ask the question—what protection could this spendthrift clause have possibly given to the petitioner? What could he have availed himself of under Article Sixth? The law prohibited him from putting this property beyond the reach of creditors by any such device. Therefore, we again reiterate, what possible protection or benefit could Article Sixth have given to this petitioner?

Again we urge and request the Board Member to reread the entire Trust Instrument in the light of the above principles of law as to spendthrift trusts. Petitioner could not possibly “have availed himself of the *protection* of this provision”. The sole protection of that clause was to protect certain persons from the claims of *their* creditors. But this protection did not and could not extend to the petitioner and save him from his creditors, because he was the *owner of the property in question*, and a man simply *can not* protect his property in this fashion from the claims of creditors.

The *Clarence P. Byrnes case*, 39 B. T. A. —, No. 77, upon which the Board relies, is not only distinguishable upon its facts, but it is also apparent that the question of law as to the power of the donor of a trust to make himself one of the beneficiaries of a spendthrift clause was not raised in that case and hence was not passed upon by the Board.

Counsel are advised that that case is now upon appeal of the taxpayer to the Circuit Court of Appeals for the Third Circuit upon this issue. We respect-



fully contend that the *Byrnes case* should not be held controlling of the decision of the case at bar.

### *Irrevocability of the Two Assignments*

There is one other point to be considered.

While the Board Member declined to base his opinion upon it, yet the statement is made in the first part of the Board's Opinion that possibly the two assignments were subject to change by the petitioner because the two assignments read that the amounts so assigned thereunder should become part of the corpus of the trust "when so transferred".

Again we ask the Board to reread the entire assignments. The first sentence of both assignments contains the Granting Clause, which contains the words of *present conveyance* and transfer, and hence should be controlling of the intention of the donor. That sentence reads as follows:

"This is to instruct you to make the following transfers from income to principal during the fiscal year ending March 4, 1934."

It is in the last sentence of the assignment that the phrase in question, "when so assigned", occurs, and it is clear that that sentence is *directory* only, and was added simply to indicate where the funds were to be deposited, to wit, in the Savings Department of the Bank. It surely will not be contended that this directory phrase takes precedence over the Granting Clause, or that this directory phrase destroyed the irrevocability of the assignment.

28 There is not a word in the stipulation of facts which lends any color to such an assumption. Upon the contrary it is quite clear from the stipulation of facts that both the petitioner and the trustee Bank treated and regarded the assignments as irrevocable. The facts are that the two assignments were actually executed and performed by the trustee Bank before the taxable years in question were ended, hence these two assignments were executed contracts, and the money was in the hands of the trustee, and was held by it for the benefit of petitioner's wife and children. There was absolutely nothing the petitioner could do about the two assignments thereafter. They were executed, carried out and completed.



The Board's statement as to the revocability of these two assignments is completely answered by the case of *Yolande V. Perkins*, 38 B. T. A. 189, where an assignment almost identical in its terms with the one here in question was made. That case, hereinafter discussed, together with the cases of *Ellen S. Booth*, 36 B. T. A. 141 and *Grace Scripps Clark*, 16 B. T. A. 453, are so pertinent that we submit this point squarely upon their authority.

More than that, however, these two assignments were made in exact accordance with the provisions contained in the Trust Instrument itself providing for additions to the trust funds. Once made these two assignments were no less irrevocable than was the Trust Instrument itself, because the assignments were made pursuant to the terms of the original trust instrument.

The Commissioner has made no contention at any time that these two assignments were revocable. It is difficult to see how the Commissioner could make such a  
29 contention when the stipulation of facts recites that the trustee Bank *accepted* the petitioner's two letters as assignments of the amounts in question, transferred those two amounts to the principal of the trust for the benefit of the wife and children, and made the necessary entries on its books and records to record the transfers.

Shall we stultify the Bank in its sworn duty as trustee by assuming that those records do not correctly reflect the facts? If the Bank accepted these two assignments as a trust and actually added the funds to the corpus, then under the law of trusts the Bank would be liable for dereliction of duty if it recorded the transaction otherwise. Have we any right to assume that it did? If these two assignments were revocable, then every assignment or transfer of additional property to a trust by the donor of the trust must likewise be revocable. Obviously that can not be so. The reason, of course, is because such additional gifts to the trust property (which are usually informal in their nature and frequently made by word of mouth) actually relate back to and are governed by the provisions in the original trust instrument itself. We respectfully refer the Board to petitioner's original brief herein, pages 12 to 15, for discussion of the authorities as to the validity and ir-

revocability of trusts thus created or engrafted on to a prior trust instrument.

If the two assignments here were revocable, then the assignments in the *Blair case*, 300 U. S. 5, *Commissioner v. Field*, 42 F. (2d) 820, *Shanley v. Bowers*, 81 F. (2d) 30 13, *Brown v. Fletcher*, 235 U. S. 589, *Lelia W. Stokes*, 28 B. T. A. 1245, and *Yolande V. Perkins*, 38 B. T. A. 189—were all revocable assignments also, for they all involved assignments of trust income *not yet earned* by the trust. Yet the Courts or the Board held in each of those cases that such assignments were irrevocable.

Any lingering doubts the Board Member may have as to the irrevocability of these two assignments, however, should be completely dispelled by the recent decision of the Board in which there was an assignment almost identical with the one here. In the case of *Yolande V. Perkins*, 38 B. T. A. 189, the assignment read as follows:

“In pursuance of the provisions of articles Fifth and Sixth of the Will of Frederick W. Perkins, you are hereby directed from and after this date to pay the net income from said Trust to my two daughters, Emily and Yolande, in equal shares.”

Said the Board:

“Thus it appears that the petitioner is being taxed upon income which she did not receive and which she had no right to receive after her direction to the trustee to pay it to another. The respondent defends this on the ground that the direction was revocable. But there was no reservation by her of a right to revoke and no qualification of her exercise of the power to direct payment to the children. The direction was beyond recall. After the direction of October 1, 1934, the power was extinguished and petitioner no longer had any control over the trust income either to direct it to herself or to anyone else. Cf. *Lelia W. Stokes*, 28 B. T. A. 1245; *Ellen S. Booth*, 36 B. T. A. 141 (on review C. C. A., 6th Cir.). Moreover, had there been doubt as to the intention that the direction of October 1, 1934, should have permanent effect, it was set at rest by a later confirmation in writing, dated December 11, 1936.

\* \* \*

31 “The petitioner was, after October 1, 1934, not a beneficiary of the trust, had no right to the trust in-



come, and did not in fact receive it. The Commissioner was in error in including it in her income, and the determination is reversed."

### *In Summary*

The point upon which the Board decided this case, to wit, that the donor was included as one of the beneficiaries of the spendthrift clause (Article Sixth), was not made by the Commissioner at the hearing of this case. That point consequently was never argued to the Board at the hearing and petitioner had no opportunity to clarify this point in oral arguments before the Board.

In view of the foregoing petitioner prays that this motion may be granted and earnestly requests the Board to permit reargument of the case upon this one point.

Respectfully submitted,

J. G. KORNER, JR.

GEORGE D. BRABSON

404 Transportation Building

Washington, D. C.

*Attorneys for Petitioner*

### *Addendum*

Since preparing the above Motion counsel have found numerous Connecticut cases which bear on this point. Some of them are as follows:

In the case of *John James Mason v. The Rhode Island Hospital Trust Co.*, 78 Conn. 81, it is held that an equitable life estate may be created for the benefit of another which will be inalienable by the beneficiary and beyond the reach of creditors. The Court says, "upon repeated occasions we have said or plainly intimated that such provisions annexed to an equitable life estate created for the benefit of another were effective to prevent the alienation by the cestui que trust of his interest or estate and to shield it from the grasp of creditors." Citing *Leavitt v. Beirne*, 21 Conn. 1; *Johnson v. Commercial Bank*, 21 Conn. 148; *Farmers & M. Savings Bank*, 27 Conn. 600.

There are also cited in this opinion 36 Conn. 18; 37 Conn. 384; 49 Conn. 519; 50 Conn. 493; 72 Conn. 45; 74 Conn. 564.



There are also cited in this opinion the cases of Nichols v. Eaton, 91 U. S. 716, 725; Hyde v. Wood, 94 U. S. 523.

33 United States Board of Tax Appeals

Docket No. 92701.

ERNST HUBER, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

*Order*

The Board having given careful consideration to the oral arguments heard on Monday, June 12, 1939, in support of the motion of the petitioner to reconsider its Opinion promulgated and the decision entered thereon in the above entitled proceeding, it is hereby

ORDERED: That the motion for reconsideration be and the same is hereby denied.

Dated: Washington, D. C.

July 13, 1939.

(Signed) J. RUSSELL LEECH.

(Seal)

*Member.*

34 Endorsed: United States Board of Tax Appeals  
Filed Oct 6-1939

United States Board of Tax Appeals

Board of Tax Appeals

No. 92701

ERNST HUBER, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

*Stipulation*

It is hereby stipulated by and between the parties hereto, acting through their respective counsel of record, that pursuant to the provisions of section 1002, Revenue Act of 1926, as amended by section 519(a), Revenue Act of 1934 (48 Stat. 760, 26 U. S. C. A. sec. 1225), the appeal of the taxpayer from the final order and decision of the Board of

Tax Appeals, heretofore entered herein on July 13, 1939, may be taken to the United States Court of Appeals for the District of Columbia.

GEORGE D. BRABSON  
Transportation Building  
Washington, D. C.  
*Attorney for petitioner.*

SAMUEL O. CLARK, JR.  
*Attorney for respondent.*

35      Endorsed: United States Board of Tax Appeals  
Filed Oct 6-1939

United States Board of Tax Appeals

Board of Tax Appeals  
Docket No. 92701

ERNST HUBER, *Petitioner on Review*

v.

GUY T. HELVERING, Commissioner of Internal Revenue,  
*Respondent on Review*

*Petition for Review and Assignments of Error*

To the Honorable Judges of the United States Court of Appeals for the District of Columbia:

Now comes Ernst Huber in support of this, his petition for review, filed pursuant to the provisions of Secs. 1001, 1002 and 1003 of the Act of Congress entitled the Revenue Act of 1926, as amended by Sec. 1101 of the Revenue Act of 1932, and by Sec. 519 of the Revenue Act of 1934, for the review of the decision and final order of the Board of Tax Appeals rendered the 13th day of July, 1939, denying the petitioner's Motion for Reconsideration of its decision rendered May 29, 1939, determining and ordering deficiencies in income taxes against the petitioner for the

|           |                        |
|-----------|------------------------|
| Year 1933 | Deficiency \$1,105.00  |
| Year 1934 | Deficiency \$1,084.11, |

and shows to the Court as follows:

## I

Your petitioner on review, hereinafter referred to as the taxpayer, is an individual residing at Long Hill, Connecticut, and filed his income tax returns for the years 36 in question with the Collector of Internal Revenue for the District of Connecticut, whose office is located in the City of Hartford, Connecticut.

Your respondent on review, hereinafter referred to as the Commissioner, is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States.

## II

The Commissioner determined a deficiency in Federal income taxes against the taxpayer for the calendar year 1933 in the amount of \$1,105, and for the calendar year 1934 a deficiency in the amount of \$1,084.11, and on February 7, 1938, in accordance with the provisions of Sec. 272 of the Revenue Act of 1932 sent to the taxpayer by registered mail a notice of said deficiency. Thereafter on March 24, 1938, taxpayer filed his appeal from said notice of deficiencies to the United States Board of Tax Appeals, being Docket No. 92701.

On May 26, 1939, the Board of Tax Appeals promulgated its memorandum opinion, and on May 29, 1939, entered an order and decision in said appeal wherein and whereby the Board ordered and decided that the deficiencies determined by the Commissioner were correct, and that there was a deficiency against the taxpayer for the year 1933 in the amount of \$1,105.00, and for the year 1934 a deficiency in the amount of \$1,084.11.

Thereafter on June 1, 1939, the taxpayer filed his Motion for Reconsideration of the Board's opinion and decision. Taxpayer's Motion for Reconsideration of the Board's decision was denied by final order of the Board dated 37 July 13, 1939.

The opinion of the Board of Tax Appeals is not reported.

## III

The nature of the controversy is as follows:

On March 4, 1931, the taxpayer created an irrevocable trust by a Declaration of Trust, naming the Bridgeport



City Trust Company of Bridgeport, Connecticut, the Trustee of a substantial amount of securities, to be held and administered by the Trustee as such. In brief the trust instrument provided that the principal of the trust should be held irrevocably by the Trustee for the taxpayer's lifetime and until his children named as beneficiaries became of age. Upon the taxpayer's death the entire principal with such additions as were made thereto was to be held by the Trustee, and the income therefrom was to be paid to the taxpayer's wife and children as beneficiaries. The Board has found as a fact that "the trust was irrevocable, but petitioner as grantor reserved the power, in case his wife and children predeceased him, to designate new beneficiaries of the remainder interests, *not including himself*." The taxpayer reserved the right to add to the trust at any time such securities or other property as he designated.

On March 18, 1933, taxpayer gave written notice to the Trustee of his desire to surrender the right to receive the income from the trust to be earned during that ensuing year, and to add that amount to the principal of the trust, and the taxpayer gave written directions to the Trustee to transfer and add to the principal of the trust the  
38      entire amount which should be earned from March 4, 1933 to March 4, 1934.

On March 3, 1934, taxpayer gave similar written notice and directions to the Trustee to transfer and add to the trust principal the entire amount which should be earned from March 4, 1934 to March 4, 1935.

The Trustee acknowledged said notices and in accordance with the taxpayer's directions transferred the funds in question and added the same to the principal of the trust, and upon its trust books and records the Trustee recorded the transactions as additions to the corpus of the trust. The Trustee advised the taxpayer of the transfer of the funds to the principal of the trust.

All of the funds covered by the two assignments of March 18, 1933 and March 3, 1934, have since been held and administered by the Trustee as part of the corpus of the trust funds under the Declaration of Trust dated March 4, 1931. No part of the funds covered by the two assignments aforesaid has been distributed or disbursed by the Trustee, and no part of said funds has been received by the taxpayer or

credited to him or to his account in any way, and taxpayer has done nothing to recover or repossess said funds and has not attempted to reclaim or revest in himself any part of said funds.

Taxpayer filed his income tax returns for the years 1933 and 1934 with the Collector at Hartford, Connecticut, and paid the tax shown to be due therein, but did not  
39 include therein any part of the funds so assigned by him under date of March 18, 1933 and March 3, 1934.

The Commissioner upon audit, increased taxpayer's taxable income by including therein the sum of \$7,676.52 for the year 1933, and \$8,313.59 for the year 1934, representing the funds so assigned and transferred by the taxpayer to the principal of the trust as above stated.

In the proceedings before the Board of Tax Appeals the taxpayer contended that the taxpayer's right to receive the trust income for life was an equitable interest in the corpus of the trust which he had the right to transfer and assign like any other property under well established principles of law of trusts and under the doctrine of *Blair v. Commissioner*, 300 U. S. 5; and having assigned that interest irrevocably and finally so that he could not possibly revest in himself any further interest in such funds, that the said funds were not and could not become his income, hence were not taxable to him, but were taxable to the beneficiaries of the trust.

The Commissioner before the Board abandoned his former contentions, and raised a new argument to the effect that there was a spendthrift clause in the trust instrument which prevented the taxpayer from assigning the trust income, and hence the taxpayer should be taxed on such income constructively even though the facts showed that the taxpayer had actually assigned the funds and that the Trustee now holds said funds as part of the trust corpus.

40 The Board held that the trust instrument contained a spendthrift clause and hence the taxpayer was prevented from assigning the income prior to its receipt by him, even though the facts showed that the taxpayer was not one of the beneficiaries named in the trust or included within the provisions of the spendthrift clause.



## IV

The taxpayer states that in the record and proceedings before the Board of Tax Appeals and in the decision and order of determination, and in the Board's final order denying taxpayer's Motion for Reconsideration, manifest error occurred and intervened to the prejudice of the taxpayer, and the taxpayer accordingly assigns the following errors which he avers occurred in said record, proceedings, decision and final orders entered by the Board, to wit:

1. The Board erred in holding that the taxpayer was one of the beneficiaries named in the trust instrument, or contemplated under the provisions of the spendthrift clause thereof.

2. The Board erred in holding that taxpayer was restricted in any way by the trust instrument from assigning his equitable interest in the trust.

3. The Board erred in holding that the taxpayer constructively received the funds here in question.

4. The Board erred in holding that the taxpayer was subject to income taxes on an equitable interest in the trust property which he had assigned and transferred to the Trustee for the benefit of his wife and children.

41 5. The Board erred in holding that this case was the same in fact and was governed by the Board's prior decision in *C. P. Byrnes*, 39 B. T. A. —, No. 77.

6. The Board erred in holding that the funds in question could be transferred to corpus of the trust only after the taxpayer had constructively received such funds.

7. The Board erred in failing to hold that the two assignments in question constituted irrevocable assignments of the taxpayer's equitable interest in the trust during the years in question and, therefore, did not constitute income to the taxpayer.

8. The Board erred in failing to find for the taxpayer upon the facts of record.

9. The Board erred in failing to grant taxpayer's Motion for Reconsideration of its decision.

WHEREFORE the taxpayer petitions that the decision and final order of the Board of Tax Appeals be reviewed by the United States Court of Appeals for the District of Columbia, that a transcript of the record be transmitted to



the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by the said Court.

D. H. BLAIR,  
J. G. KORNER, JR.  
GEORGE D. BRABSON  
*Attorneys for Petitioner*

42      STATE OF CONNECTICUT  
            *County of*                      ss

Personally appeared before me, a Notary Public in and for said State and County, Ernst Huber, who being duly sworn deposes and says that he is the petitioner and that he has read the foregoing petition for review, and that the facts therein set forth are true to the best of his knowledge, information and belief, and that this petition is not filed for the purpose of delay because petitioner believes he is justly entitled to the relief sought.

(Sgd) ERNST HUBER

Sworn to and subscribed before me this 5th day of October, 1939.

(Sgd) THOMAS R. RICHMOND  
(Seal)                                      *Notary Public*

43      Endorsed: United States Board of Tax Appeals  
            Filed Oct 6 - 1939

*Notice of Filing Petition for Review*

(Filed October      1939)

In the United States Court of Appeals for the District  
            of Columbia

No. ....

Board of Tax Appeals

Docket No. 92701

ERNST HUBER, *Petitioner on Review,*

v.

GUY T. HELVERING, Commissioner of Internal Revenue, *Respondent on Review*

Hon. Guy T. Helvering,  
Commissioner of Internal Revenue,  
Washington, D. C.

Sir:

You are hereby notified that the above named petitioner did on the 6th day of October, 1939, file with the Clerk of the United States Board of Tax Appeals of Washington, D. C., a petition for review by the United States Court of Appeals for the District of Columbia, of the decision of the Board heretofore rendered in the above entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

(s) D. H. BLAIR

(s) J. G. KORNER, JR.

(s) GEORGE D. BRABSON,

404 Transportation Building  
Washington, D. C.

*Attorneys for Petitioner on  
Review*

44 Personal service of the above and foregoing Notice, together with copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 6th day of October, 1939.

J. P. WENCHEL

*Chief Counsel, Bureau of In-  
ternal Revenue*

45 Endorsed: U. S. Board of Tax Appeals Filed at  
hearing Mar. 2 1939

United States Board of Tax Appeals

Docket No. 92701

ERNEST HUBER, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

*Stipulation of Facts*

I

Petitioner, Ernst Huber, is an individual, a citizen of the United States, married and living with his wife at Long Hill, Connecticut.

## II

Petitioner filed his income tax returns for the years in question, 1933 and 1934, on the cash receipts and disbursements basis.

## III

On March 4, 1931, petitioner created a trust by declaration of trust, naming the Bridgeport City Trust Co. as Trustee, and conveyed certain securities to the Trustee to be held and administered thereunder. A copy of said declaration of trust is attached hereto and made a part hereof, and is marked "Exhibit A".

The Trustee took over said property and has since held and administered the same under the provisions of  
46 said trust declaration, and filed fiduciary returns of the income therefrom for all years subsequent to the date thereof.

## IV

On December 31, 1932, petitioner gave written instructions to the Bridgeport City Trust Co., Trustee, to make certain additions to the trust principal, as set forth in a copy of said instructions hereto attached and made a part hereof, and marked "Exhibit B".

In accordance with said instructions the Trustee transferred the funds in question and added the same to the principal of the trust funds in its possession under the declaration of trust dated March 4, 1931, and made the necessary entries on its books and records to record the transfer.

Said assignment is not here in dispute.

## V

On March 18, 1933, petitioner gave written instructions to the Bridgeport City Trust Co., Trustee, to make certain additions to the trust principal, as set forth in a copy of said instructions hereto attached and made a part hereof, and marked "Exhibit C".

In accordance with said instructions the Trustee transferred the funds in question and added the same to the principal of the trust funds in its possession under the



declaration of trust of March 4, 1931, and made the necessary entries on its books and records to record the transfer.

## VI

On March 3, 1934, petitioner gave similar written instructions to the Bridgeport City Trust Co., Trustee, to make certain additions to the trust principal, as set forth in a copy of said instructions hereto attached and made a part hereof, and marked "Exhibit D".

In accordance with said instructions the Trustee transferred the funds in question and added the same to the principal of the trust funds in its possession under the declaration of trust of March 4, 1931, and made the necessary entries on its books and records to record the transfer.

## VII

No part of the funds covered by the two assignments of March 18, 1933, and March 3, 1934, has been distributed or disbursed by the Bridgeport City Trust Co., the Trustee, and all of said funds are now held by the said Trustee as part of the principal of the trust funds under the declaration of trust dated March 4, 1931.

No part of the funds so assigned has been received by the petitioner or credited to him or to his account in any way, and petitioner has done nothing to recover or repossess said funds, and has not attempted to reclaim or re-vest in himself any part of said funds.

## VIII

Petitioner filed his income tax returns for the years 1933 and 1934 with the Collector of Internal Revenue at Hartford, Connecticut, and paid the tax shown to be due thereon, but did not include therein any part of the funds so assigned by him under date of March 18, 1933, and March 3, 1934.

Upon audit respondent increased the net taxable income reported by petitioner, by including therein the sum of \$7,676.52 for the year 1933, and \$8,313.59 for the year 1934, representing the funds so assigned and trans-

ferred by the petitioner under date of March 18, 1933 and March 3, 1934, as aforesaid.

GEORGE D. BRABSON

Transportation Building, Wash-  
ington, D. C.,

*Counsel for petitioner.*

J. P. WENCHEL

*Counsel for respondent.*

February 23, 1939.

49        This Indenture of Trust made this 4th day of March, 1931, by and between Ernst Huber residing at Trumbull, Connecticut, (hereinafter referred to as the Donor), and The Bridgeport City Trust Company, a corporation of the State of Connecticut having its principal office in Bridgeport, Connecticut, (hereinafter referred to as the Trustee):

Witnesseth:

Whereas, the Donor desires to assign, transfer and deliver to the Trustee certain property and securities hereinafter described for the purpose of creating a voluntary living trust; and

Whereas, the Trustee has agreed to accept said property and securities and to hold the same and the proceeds and income thereof upon the trusts hereby created;

Now Therefore, In consideration of the mutual covenants herein contained, and of other good and valuable considerations, and the sum of One Dollar (\$1.00) by the Trustee to the Donor in hand paid at or before the ensealing and delivery of these presents, receipt whereof is hereby acknowledged, the Donor has granted, conveyed, assigned, set over and delivered, and by these presents does grant, convey, assign, set over and deliver unto the said Trustee, its successors and assigns, all his right, title and interest in and to the property and securities described in Schedule "A" which, signed by the Donor, is attached hereto and made a part hereof, together with the appurtenances and all the estates and rights of the Donor thereto:

TO HAVE AND TO HOLD all and singular the above granted and described property and securities, together



with any property and securities which may be added to and included by the Donor in Schedule "A" or any other schedules attached hereto and made a part hereof, unto the said Trustee, its successors and assigns, In Trust Nevertheless, for the following purposes and uses, and subject to the terms, conditions, powers and agreements hereinafter set forth, namely:

First: To receive, hold and manage all the property conveyed by this indenture, together with any investitures by the Donor hereinafter made a part of this trust; to sell, transfer and exchange all or any part of said property as though the absolute owner thereof, and to collect, receive and recover the rents, issues, interest, income and profits thereof, and after deducting the commission of the Trustee as hereinafter provided and the proper and necessary expenses in connection with the administration of this trust, to pay and apply the income and the principal thereof in the manner and upon the terms and conditions as may or shall be hereinafter provided.

50 Second: During the lifetime of the Donor to invest and reinvest the funds now or hereafter in its hands without regard to any law or statute prescribing or regulating trust investments. After the death of the Donor the Trustee shall invest and reinvest the funds coming into its hands only in such investments as shall be lawful for the investment of trust funds under the laws of the State of Connecticut. The Trustee may at all times purchase for investment through its bond, mortgage or other departments, paying for the securities purchased not more than the price at which the same securities are offered for sale to the general public.

Third: To retain by way of investment any property or securities transferred to it, without liability for depreciation, to subscribe for and take any increase in the capital stock of any corporation in which it may hold stock as trustee hereunder, whether or not the same be legal for the investment of trust funds; and in accepting title to real estate the Trustee shall not be held to have assumed the payment of any encumbrances thereon, nor any responsibilities as to the validity of the title conveyed to or held by it. All conveyances executed and delivered by it shall be without covenants of warranty except as against its own acts.



Fourth: The Trustee may cause securities which may from time to time comprise the trust fund, or any part thereof, to be registered in its name as Trustee hereunder, or in the name of its nominee, or to take and keep the same unregistered, and to retain them or any part thereof, in such condition that they will pass by delivery.

Fifth: The Trustee shall treat as income each and every regular stock dividend. Each and every extraordinary stock dividend shall be treated as principal. Except as above set forth, the Trustee shall in its own discretion, determine whether or not money or property coming into its possession shall be treated as income or principal. In the case of securities taken or purchased for the trust fund at a premium, the Trustee shall not be required to set aside any part of the income thereof as a sinking fund to retire or absorb such premium.

Sixth: Neither the principal nor the income of the trust funds shall be liable for the debts of any beneficiary hereof, nor shall the same be subject to seizure by any creditor of any beneficiary under any writ or proceeding at law or in equity, and no beneficiary hereunder shall have any power to sell, assign, transfer, encumber or in any other manner to anticipate or dispose of his or her interest in the trust funds or the income produced thereby.

Seventh: The Trustee may compromise, compound and adjust claims in favor of or against the trust estate, upon such terms and conditions as it may deem best; and may do all things for the preservation in and about the management of said trust property that it may consider necessary or proper and for the best interest of the same.

51 Eighth: The Trustee shall furnish to the Donor during his lifetime, and each of the beneficiaries after the Donor's decease, whenever requested, a statement of the receipts and disbursements of said trust estate, and at least once in each year to furnish the Donor, and after his decease said beneficiaries, a full and complete schedule of all securities and other property comprising the subject matter of the trust herein created.

Ninth: The Trustee and its successors and assigns shall in no event be liable for any mistakes in judgment in the making or retaining of investments so long as the same be made or retained in good faith.

Tenth: The Trustee shall have a first and prior lien on the entire trust estate, both as to principal and income, as security for the prompt payment of charges of the Trustee as and when the same shall become due as herein set forth, including any advances or loans made by it, with interest thereon at prevailing rates, together with any and all expenses incurred or paid by it in connection with this trust; and to secure the payment and discharge as and when due, the principal and interest respectively of any lien, encumbrance or other charges against the trust property, and further, as security for any and all losses or expenses, including attorney fees and liabilities of every kind and nature which it may at any time expend, incur or suffer by reason of its ownership of the trust property, by reason of the terms of this agreement or by reason of any of its acts or commissions performed by it in good faith as such Trustee.

Eleventh: The Trustee shall receive as its compensation for acting hereunder a fee of five per centum (5%) per annum upon the income received and paid out, and shall also receive, upon any distribution of the principal of the trust estate a fee of one-half of one percentum of such principal of the trust estate so distributed.

Twelfth: The Trustee may resign from the trusts hereby created at any time upon giving thirty (30) days written notice of its intention to resign, duly signed and acknowledged by one of its officers and delivered personally or by registered mail to the Donor herein, or to the beneficiaries, if the Donor is deceased, and upon payment and delivery to the Donor, or any successor Trustee as hereinafter provided, if the Donor is deceased, all of the property and assets of the trust estate, and after full settlement of its accounts, the trusts herein created shall terminate without any application to or further action by any court.

Thirteenth: In the event the Trustee hereunder shall resign, become disqualified or cease to act as such Trustee, the Donor, during his life time, or a majority of the  
52 adult beneficiaries named hereunder, after his death, are hereby authorized and empowered by instrument in writing, duly executed and acknowledged, to select as successor to the Trustee, any Bank or Trust Company duly incorporated under the laws of the State of Connecticut,



authorized to perform the duties as such Trustee and having its principal place of business in the City of Bridgeport, and in such event the Bank or Trust Company so selected is hereby appointed Trustee hereunder, with all powers and duties herein conferred upon the said Trustee.

Fourteenth: The Donor expressly surrenders all right and power to amend, modify or revoke this trust, in whole or in part; provided, however, that if all the beneficiaries herein named or described should predecease the Donor, then the Donor shall have the power of appointing other beneficiaries (not including himself) and of specifying the terms and conditions under which either income or principal may be paid to them, which power shall be exercised by the making of an agreement supplemental to this one.

Fifteenth: Although upon the execution of this agreement no part of the corpus of this trust shall be or remain in the Donor, and although upon the execution hereof he shall have no power over the disposition and distribution of the principal and income thereof, the Trustee understands, and by acceptance of this trust agrees, that it will not lease, sell, transfer or reinvest any funds of the trust by virtue of this deed of conveyance during the lifetime of the Donor, without his written consent. It shall not, however be required of any firm, person or corporation dealing with the Trustee to ascertain whether such consent shall have been given, and every such firm, person or corporation shall be protected in relying solely upon the deed, transfer or assurance of the Trustee.

Sixteenth: The Donor may, from time to time, sell, assign, transfer or deed over to the Trustee other and additional property which shall be held and distributed in the same manner as the property now subject to said trust, and upon the delivery of such additional property or evidence thereof to the Trustee, and subject to its acceptance, a supplemental schedule describing such property shall be prepared which, when identified by the signatures of the Donor and the Trustee shall be attached to and made a part of this Trust Indenture.

Seventeenth: The Trustee shall use, manage and dispose of the net income, and ultimately the principal, of the trust estate as follows:



(A) The Trustee shall pay the entire net income in quarterly, or if convenient, more frequent installments to the Donor during his lifetime.

53 1. If, in any year during the Donor's lifetime (year meaning each twelve months commencing with the date hereof) the net income does not equal the sum of Ten Thousand Dollars (\$10,000) the Donor shall, if he so requests, be paid from the principal such amount as added to the net income will make a total of Ten Thousand Dollars; any such payment of principal, however, shall be cumulative, and shall be paid back to the principal out of excess net income over the sum of Ten Thousand Dollars as and when available in the subsequent year or years.

(b) Upon the death of the Donor the Trustee shall divide the then trust estate into four equal parts, each of which shall be separately held in trust, invested and reinvested and shall be managed and disposed of by the Trustee as follows:

1. The Trustee shall pay the entire net income of one of said parts to the Donor's wife, Lillian W. Huber, during her lifetime or until she shall remarry. Upon her death or remarriage, or if she shall predecease the Donor, the principal then constituting such part shall be equally added to and commingled with the remaining three parts to be used, managed and disposed of in accordance with the provisions hereinafter set forth for the use, management and disposition of said parts.

2. The Trustee shall divide the remaining three parts into as many equal parts as the Donor shall leave children surviving him (counting for such purpose any deceased child who shall have left a child or children surviving the Donor) and shall separately hold in trust the parts divided as aforesaid, invest and reinvest the same, collect the income thereof and manage and dispose of the net income and the principal of one of said parts for the respective benefit of each of the Donor's children entitled thereto as aforesaid.

(a) The Trustee shall expend so much of the net income and of the principal of one of said parts as in its sole judgment the particular child entitled thereto shall require for its support, maintenance and education until it shall reach the age of 21 years, and shall accumulate the part not so

expended. Thereafter the Trustee shall pay to such child the net income of such part in quarterly or if convenient more frequent installments until such child shall reach the age of 30 years when the principal of such child's  
54 part (or the residue thereof) shall be paid over to it free and clear of this trust, together with any accumulations previously withheld.

(b) If any child shall have predeceased the Donor leaving issue surviving the Donor, or if any child entitled to a part as aforesaid shall die before reaching the age of 30 years leaving issue surviving, the Trustee shall divide its part into as many equal shares as such child shall leave children (grandchildren of the Donor) and shall, subject to the same powers, separately hold in trust one of said shares for the benefit of each such grandchild, collect the income thereof and expend so much of the net income or principal thereof as such grandchild, in the sole opinion of the Trustee, shall require for his or her support, maintenance and education, until he or she shall reach the age of 21 years, whereupon the principal of his or her share shall be paid over to such grandchild, free and clear of this trust.

(c) If any such grandchild entitled to a share as aforesaid shall die before reaching the age of 21 years leaving issue, the trust as to such grandchild's share shall thereupon terminate and the principal thereof, together with any accumulations thereon shall be disposed of, free and clear of this trust, in accordance with the Statute of Distributions as to personal property then in effect at the then domicile of said deceased grandchild.

(d) If any such grandchild entitled to a share as aforesaid shall die before reaching the age of 21 years leaving no issue the share of such deceased grandchild shall be equally added to and commingled with the shares of its surviving brothers and sisters, if any, otherwise to the remaining parts and shares herein entrusted, per stirpes, and shall thereafter be managed and disposed of in accordance with the provisions herein set forth for the management and disposition of such parts and shares.

(e) If any child entitled to a part as aforesaid shall die before reaching the age of 30 years leaving no issue surviving, the part of such child shall upon its death be equally added to and commingled with the parts herein entrusted



for the benefit of its brothers and sisters or the shares of a deceased brother or sister, per stirpes and not per capita.

55 IN WITNESS WHEREOF, the parties hereto have executed this agreement, in duplicate, the day and year first above written.

ERNST HUBER (L. S.)

Witnessed by  
JONATHAN GROUT

THE BRIDGEPORT-CITY TRUST COMPANY  
(L. S.)

By H. L. MOREHOUSE V. P.

*Schedule A*

3000 shares The Borden Company—certificates Nos. G48826 to G48855, inclusive, 100 shares each

Dec. 13, 1932 The following added to and made a part hereof, attached Trust Indenture.

250 shares McKesson & Robbins, Inc. Preference Series A. stock.

ERNST HUBER  
THE BRIDGEPORT-CITY TRUST CO.  
By H. L. MOREHOUSE,  
*Vice-Pres.*

56 *Copy*

Dec. 31, 1932.

The Bridgeport-City Trust Co., Trustee,  
Bridgeport, Connecticut.

Gentlemen:

I hereby authorize and instruct you to charge income account on trust established by me under date of March 4th, 1931 for the balance of income, as shown thereon, as of the present date.



I further authorize and instruct you to credit such amount to the principal of said Irrevocable Trust Fund.

Very truly yours,

ERNST HUBER

M:W

57

*Copy*

Mar. 18, 1933

The Bridgeport-City Trust Co.,  
Trustee u/a with Ernst Huber,  
Bridgeport, Connecticut.

Gentlemen:

This is to instruct you to make the following transfers from income to principal during the fiscal year, ending March 4th, 1934:

|                   |              |
|-------------------|--------------|
| Balance of income | June 4, 1933 |
| " " "             | Sept. " "    |
| " " "             | Dec. " "     |
| " " "             | Mar. " 1934  |

These amounts, when so transferred, are to become a part of the principal of the fund and are to be deposited in your Savings Department.

Very truly yours,

ERNST HUBER

Witness:

H. L. MOREHOUSE

M;w

58

*Copy*

The Bridgeport-City Trust Company  
Bridgeport, Connecticut

March 3, 1934

The Bridgeport-City Trust Company,  
Trustee u/a with Ernst Huber,  
Bridgeport, Conn.

Gentlemen:

This is to instruct you to make the following transfers from income to principal during the fiscal year ending March 4th, 1935:

|                   |                 |
|-------------------|-----------------|
| Balance of income | June 4, 1934    |
| " "               | " Sept. 4, 1934 |
| " "               | " Dec. 4, 1934  |
| " "               | " Mar. 4, 1935  |

These amounts, when so transferred, are to become a part of the principal of the fund and are to be deposited in your Savings Department.

Very truly yours,

ERNST HUBER

Certified and guaranteed to be a true and correct copy of the original instrument on file in the office of The Bridgeport-City Trust Company, Bridgeport, Conn. If revocable, we further certify that said instrument is unrevoked and still in full force and effect.

2-21-39

THE BRIDGEPORT-CITY TRUST COMPANY

Subscribed and sworn to before me.

ELSIE WRIGHT—  
*Notary Public*

Witness:

H. L. MOREHOUSE

59      Endorsed: United States Board of Tax Appeals  
Filed Nov 4 1939

United States Court of Appeals  
for the District of Columbia

B. T. A. Docket No. 92701

ERNST HUBER, *Petitioner on Review,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent on Review.*

*Petition on Review*

*Praecipe for Record*

To the Clerk of the United States Board of Tax Appeals:  
You will please prepare, transmit and deliver to the

Clerk of the United States Court of Appeals for the District of Columbia, copies duly certified as correct of the following documents and records in the above entitled cause, in connection with the Petition for Review by the said United States Court of Appeals for the District of Columbia heretofore filed by the above named petitioner:

1. Docket entries of the proceedings before the Board of Tax Appeals.

2. Pleadings before the Board, including,

(a) Petition and annexed copy of deficiency notice,

(b) Answer.

3. Opinion and Decision of the Board of Tax Appeals.

4. Motion for Reconsideration and Rehearing; and Order of the Board denying said motion, dated July 13, 1939.

5. Stipulation of venue, filed October 6, 1939.

6. Petition for Review, together with Proof of Service of Notice of Filing Petition for Review, and of service of a copy of the Petition for Review.

60 7. Stipulation of Facts, together with Exhibits A, B, C, and D, appended thereto.

8. This Praecipe.

GEORGE D. BRABSON

Transportation Building

Washington, D. C.

*Attorney for Petitioner on  
Review.*

Service of a copy of the within Praecipe is hereby admitted this 4th day of November, 1939.

J. P. WENCHEL

*Attorney for Respondent on  
Review.*



United States Board of Tax Appeals  
Washington

Docket No. 92701

ERNEST HUBER, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.*Certificate*

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 60, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeceptum in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 14th day of November, 1939.

B. D. GAMBLE

(Seal)

*Clerk, United States Board of  
Tax Appeals.*

Endorsed of Cover: No. 7548. Huber, Petitioner, vs. Helvering. United States Court of Appeals for the District of Columbia Filed Nov 15 1939 Joseph W. Stewart, Clerk







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United States Court of Appeals for the  
District of Columbia

OCTOBER TERM, 1939.

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No. 7548.

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ERNST HUBER,  
PETITIONER,

*vs.*

GUY T. HELVERING, Commissioner of  
Internal Revenue,  
RESPONDENT.

---

BRIEF ON BEHALF OF PETITIONER.

---

D. H. BLAIR,  
GEORGE D. BRABSON,  
404 Transportation Building,  
Washington, D. C.,  
*Attorneys for Petitioner.*

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BATAVIA TIMES, LAW PRINTERS,  
BATAVIA, N. Y.  
CHARLES W. WARDEN, WASHINGTON REPRESENTATIVE.  
TOWER BUILDING



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United States Court of Appeals for the  
District of Columbia

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OCTOBER TERM, 1939.

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No. 7548.

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ERNST HUBER,

PETITIONER,

*vs.*

GUY T. HELVERING, Commissioner of  
Internal Revenue,

RESPONDENT.

---

BRIEF ON BEHALF OF PETITIONER.

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Statement of the Case.

This is an appeal from a decision of the United States Board of Tax Appeals entered July 13, 1939. The case was docketed before the Board of Tax Appeals as No. 92701. The findings of fact and opinion of the Board were promulgated on May 26, 1939. The Board's opinion is a Memorandum Opinion and is not reported. The petition for review was filed on October 6, 1939. This appeal involves deficiencies for the calendar years 1933 and 1934 as follows:

| <i>Year</i> | <i>Deficiency</i> |
|-------------|-------------------|
| 1933 .....  | \$1,105.00        |
| 1934 .....  | \$1,084.11        |

All of said deficiencies are in controversy.

This cause originated upon a notice of deficiency issued to taxpayer on February 7, 1938, from which taxpayer appealed to the Board of Tax Appeals. In said deficiency notice the Commissioner asserted a deficiency based upon one ground only, to wit: that the income from a trust created by the taxpayer had not been irrevocably assigned by the taxpayer and hence was still taxable to him. At the hearing before the Board the Commissioner changed his position and contended that the taxpayer had made himself a beneficiary of a spendthrift clause in the trust instrument, and hence was restrained from assigning his interest in said trust.

The Board decided the case on the latter issue and held for the Commissioner.

### **The Issues.**

1. Did the assignments in question constitute irrevocable assignments by the taxpayer of his equitable interest in the trust?

2. Was the taxpayer one of the beneficiaries of the spendthrift clause in the trust instrument?

### **Statement of Facts.**

All of the facts were stipulated by the parties, and are contained in the stipulation of facts and exhibits filed as a part thereof.

Taxpayer is a resident of Long Hill, Connecticut, married and living with his wife and two children. He

filed his income tax returns for the years in question on the cash receipts and disbursements basis.

On March 4, 1931, taxpayer created an irrevocable trust naming the Bridgeport City Trust Company as Trustee, and conveyed certain securities to the Trustee to be held and administered thereunder. The Trustee took over said property and has since held and administered the same and the additions thereto under the provisions of the trust instrument, and has filed Fiduciary Returns of the income therefrom in each of the years since that date. (Stip. III; R. 33.)

Under the terms of the trust instrument taxpayer provided that the corpus of the trust with any additions thereto made by him should be held by the Trustee until the taxpayer's death, and thereafter held under certain conditions until the taxpayer's two minor children became of age. Taxpayer reserved the right to receive the income from the trust during his lifetime, and at his death provided that the income should be payable to his wife and children until said children became of age. (Ex. A, par. 17; R. 40.)

On December 31, 1932, taxpayer by written instrument addressed to the Trustee, assigned to the Trustee the right to receive the income of the trust to date and directed the Trustee to add the amount so assigned "to the principal of said irrevocable trust fund". (R. 42-43.) The funds so assigned were added by the Trustee to the trust principal and have since been administered by the Trustee as a part thereof. The Trustee made the necessary entries on its books and records to record the transfer. No part of the amount so assigned has been questioned in this proceeding.



On March 18, 1933, taxpayer by a similar written instrument addressed to the Trustee, assigned to the Trustee the right to receive the income of the trust from March 4, 1933 to March 4, 1934, and directed the Trustee to add the amount so assigned to the principal of said trust fund. The amount so assigned was added by the Trustee to the trust principal and has since been administered by the Trustee as a part thereof. The Trustee made the necessary entries on its books and records to record the transfer. (R. 34.)

On March 3, 1934, the taxpayer by a similar written instrument addressed to the Trustee, assigned to the Trustee the right to receive the income from March 4, 1934 to March 4, 1935, and directed the Trustee to add the amount so assigned to the principal of the trust fund. The amount so assigned was added by the Trustee to the trust principal and has since been administered by the Trustee as a part thereof. The Trustee made the necessary entries on its books and records to record said transfer. (R. 34.)

No part of the funds covered by the two assignments of March 18, 1933 and March 3, 1934, has been distributed or disbursed by the Trustee, and all of said funds are now held by the Trustee as part of the principal of the trust under the Declaration of Trust dated March 4, 1931. No part of said funds has been received by the taxpayer or credited to him or his account in any way, and taxpayer has done nothing to recover or repossess said funds and has not attempted to reclaim or revest in himself any part thereof. (Stip., R. 34.)

All of the funds so assigned were reported and returned by the Trustee as income of the trust, and no

part of said funds so assigned was returned or reported by the taxpayer. The Commissioner upon audit of taxpayer's returns has added the amounts so assigned to taxpayer's taxable income, upon the theory that the taxpayer did not irrevocably assign the same. Taxpayer appealed to the Board.

### **Specification of Errors to be Urged.**

1. The Board erred in holding that the taxpayer was one of the beneficiaries of a spendthrift clause in the trust instrument, and therefore was prohibited from assigning his interest in the trust income.

2. The Board erred in holding that the taxpayer as Donor of the property could create a spendthrift trust for his own benefit.

3. The Board erred in failing to hold that the two assignments in question constituted irrevocable assignments of the taxpayer's equitable interest in the trust during the years in question, and therefore did not constitute income to the taxpayer.

### **ARGUMENT.**

#### **ISSUE I.**

**Taxpayer was not a beneficiary of the spendthrift clause of the trust, and was not prohibited from assigning his interest in the trust.**

The opinion of the Board of Tax Appeals is based primarily upon the assumption that the taxpayer was

one of the beneficiaries included under the spendthrift clause (Article Sixth of the Trust Agreement), and therefore the Board concluded that the taxpayer was *prohibited* from assigning his interest in the trust. Article Sixth reads as follows:

Neither the principal nor the income of the trust funds shall be liable for the debts of any beneficiary hereof, nor shall the same be subject to seizure by any creditor of any beneficiary under any writ or proceeding at law or in equity, and no beneficiary hereunder shall have any power to sell, assign, transfer, encumber or in any other manner to anticipate or dispose of his or her interest in the trust funds or the income produced thereby.

Now, whether the taxpayer as Donor was included as one of the "beneficiaries" under Article Sixth depends upon two things:

First, did the taxpayer *intend* to include himself within the provisions of Article Sixth?

Second, could the taxpayer as a *matter of law* make himself beneficiary of a spendthrift clause in a trust of his own creation?

### **Point 1.**

**We shall treat these points in the order named.**

First, did the taxpayer intend to make himself one of the beneficiaries under the spendthrift clause?

It is fundamental that the intent of the maker of an instrument must be gathered from all its terms. We must consult the instrument as a whole, therefore, to



find out what the grantor's intent was. 65 C. J. Trusts, Sec. 246.

It is quite obvious from reading the trust instrument as a whole that Mr. Huber, the taxpayer, did not intend to make himself a "beneficiary" of the spendthrift clause. The language employed throughout the trust instrument makes it clear that Mr. Huber designated and considered himself as the "Donor" of the trust and that he designated and considered his wife and two children as the "beneficiaries" of the trust. It is equally obvious that Article Sixth (the spendthrift clause) applies *only* to those persons who are named and described as "*beneficiaries*" of the trust.

Mr. Huber, the taxpayer, never treated or considered himself as one of the "beneficiaries". There is not a single instance anywhere in the trust instrument where Mr. Huber designated, implied, or even hinted that he was to be classed as one of the "beneficiaries" of the trust. On the other hand, there are at least six places in the trust instrument where Mr. Huber made it perfectly plain that he was *not* to be considered as one of the "beneficiaries".

First. In the first place Mr. Huber in the preamble to the trust instrument specifically designates himself as the Donor, as follows:

THIS INDENTURE OF TRUST made this 4th day of March, 1931, by and between ERNST HUBER residing at Trumbull, Connecticut, (hereinafter referred to as the *Donor*), and THE BRIDGEPORT CITY TRUST COMPANY, a corporation of the State of Connecticut having its principal office in Bridgeport, Connecticut, (hereinafter referred to as the *Trustee*):

Mr. Huber refers to himself repeatedly thereafter *only* as the Donor, and in at least five other places uses the term Donor in clear contradistinction to the term "beneficiary" or "beneficiaries".

The term Donor is the only designation given to the taxpayer, Mr. Huber, throughout the entire instrument. He is referred to dozens of times thereafter, but always as the Donor. He is never referred to as a "beneficiary" in any place in the instrument.

On the other hand, the words "beneficiary" or "beneficiaries" used in many places throughout the trust instrument, regularly and invariably refer to the wife and children of the taxpayer as a class or category and they are designated by name in Article Seventeenth. These beneficiaries are "the beneficiaries herein named or described", and they are referred to as such in Article Fourteenth. Indeed, a careful scrutiny of the trust instrument reveals that the draftsman proceeded with great care and particularity to distinguish between Donor and "beneficiary" by the use of the contrasting terms differentiating them in at least five other places.

Second. The second place where Mr. Huber's intention not to consider himself as a "beneficiary" of the trust appears in Article Eighth. That article reads as follows:

The Trustee shall furnish to the *Donor* during his lifetime, and each of the *beneficiaries* after the *Donor's* decease, whenever requested, a statement of the receipts and disbursements of said trust estate, and at least once in each year to furnish the *Donor*, and after his decease said *beneficiaries*,



a full and complete schedule of all securities and other property comprising the subject matter of the trust herein created.

It requires just one reading of Article Eighth to see that Mr. Huber designated and considered himself solely as the Donor, and in contradistinction thereto used the term "beneficiaries" to apply to certain *other persons* who might survive him—to wit, his wife and children. No other construction of Article Eighth is possible. No other construction makes any sense whatever.

Third. The third place where Mr. Huber's intention is made manifest, and one so clear that it cannot possibly be misconstrued, is found in Article Twelfth, where it is provided that:

The Trustee may resign from the trusts hereby created at any time upon giving thirty (30) days written notice of its intention to resign, duly signed and acknowledged by one of its officers and delivered personally or by registered mail to the *Donor* herein, *or* to the *beneficiaries*, if the Donor is deceased, and upon payment and delivery to the Donor, or any successor Trustee as hereinafter provided, if the Donor is deceased, all of the property and assets of the trust estate, and after full settlement of its accounts, the trusts herein created shall terminate without any application to or further action by any court.

Let us observe the words: "notice \* \* \* to the *Donor*, *or* to the *beneficiaries*, if the Donor is deceased". What could be a plainer use of the language than that? The word "Donor" is actually separated from the word "beneficiaries" by the disjunctive "or", thus placing the two in separate categories, thereby separ-



ately treated and separately dealt with. If Mr. Huber can possibly be deemed a "beneficiary" under the trust instrument, then Article Twelfth is ambiguous and utterly meaningless.

Fourth. The fourth place where this clear cut contradistinction between Donor and "beneficiary" is found, is Article Fourteenth, where we find two examples. Article Fourteenth first provides that:

The Donor expressly surrenders all right and power to amend, modify or revoke this trust, in whole or in part; provided, however, that if *all the beneficiaries* herein named or described should predecease the *Donor* \* \* \*.

And secondly, to clinch the point as it were, we find a second contradistinction in the same Article as follows:

\* \* \* then the Donor shall have the power of appointing other *beneficiaries* (*not including himself*) and of specifying the terms and conditions under which either income or principal may be paid to them, \* \* \*.

If the rest of the trust instrument were vague, that article alone ought to be enough to remove any question of doubt as to what Mr. Huber intended. It can have only one construction and that is that Mr. Huber *did not consider himself a beneficiary*. Any other construction renders Article Fourteenth redundant and absurd.

For example, we find in Article Fourteenth these words, "if *all the beneficiaries* herein named \* \* \* should predecease the Donor". Now, if *all the beneficiaries* named in the trust should die, then obviously no beneficiaries would be left. But if all the beneficiar-

ies were dead, then Mr. Huber would have to be dead also, that is, *if* he were one of the beneficiaries named therein. Does that make sense?

But aside from that absurdity, Article Fourteenth shows that Mr. Huber recognized that he could not designate himself a beneficiary of the trust corpus without defeating the primary purpose of the trust. If the trust instrument were to be construed as making Mr. Huber one of the "beneficiaries herein named and described", then it would not have been an irrevocable trust at all, and the trust property would have been subject to Mr. Huber's own debts and creditors. It was to avoid any such possibility that Mr. Huber provided that the Donor should have the right to appoint other beneficiaries, but "*not including himself.*"

Fifth. The fifth place where the intent of the Donor not to classify himself as a "beneficiary" under the trust, appears in Article Sixth itself. Article Sixth provides that:

Neither the principal nor the income of the trust funds shall be liable for the debts of any beneficiary hereof, nor shall the same be subject to seizure by any creditor of any beneficiary under any writ or proceeding at law or in equity, and no beneficiary hereunder shall have any power to sell, assign, transfer, encumber or in any other manner to anticipate or dispose of his or her interest in the trust funds or the income produced thereby.

A careful reading of Article Sixth shows that its sole purpose was to protect the "beneficiaries" of the trust from losing their interest therein by levy of

creditors or by a voluntary alienation. Now, it is elemental that Mr. Huber as the original owner of the trust property could not put that property out of the reach of *his* creditors by means of a trust, transfer or any other devise so long as he retained any interest in either the trust principal or trust income. *Williston on Contracts*, 1st Ed., Sec. 1739; 27 *C. J.* p. 600.

In other words, it would have been a futile gesture for Mr. Huber to even attempt to put *his* property out of the reach of *his* own creditors. Why should he have attempted to do a thing which he must have known would be useless and of no avail against his creditors? The law will never presume that a man has done a useless and invalid thing. Every presumption is to the contrary.

In short and in summary, the trust instrument read as a whole makes it obvious that Mr. Huber intended the so-called spendthrift clause in Article Sixth to apply only to his wife and minor children, and never intended or considered Article Sixth to apply to himself. This is made doubly clear when we consider Mr. Huber's complete *inability* to make himself a beneficiary of a spendthrift provision of his own creation, in the discussion which follows.

## Point 2.

**The Board erred in holding that the taxpayer could make himself a beneficiary of a spendthrift clause in a trust of his own creation.**

We have already shown under Point 1 that Mr. Huber *did not* make himself a beneficiary of the trust



as a *matter of fact*. We now expect to show that Mr. Huber *could not* make himself a beneficiary of the spendthrift clause as a *matter of law*.

To start with, it is elementary that a man can not create a spendthrift trust for his own benefit. The rule is stated without modification or qualification in *Prof. Scott's* recent work on *Trusts*, (1939) Vol. 1, Sec. 156, as follows:

Sec. 156. *Where the settlor is a beneficiary.* Even in jurisdictions in which spendthrift trusts are permitted, the settlor cannot create a spendthrift trust for his own benefit. If the owner of property transfers it in trust to pay the income to himself for life or for a period of years, and provides that his interest under the trust shall not be assignable by him and that his creditors shall not be permitted to reach it, nevertheless he can effectively assign his interest, and his creditors can reach it. It is immaterial that in creating the trust the settlor *did not intend to defraud* his creditors. It is immaterial that he was *solvent* at the time of the creation of the trust. It is against *public policy* to permit a man to tie up his own property in such a way that he can still enjoy it but can prevent his creditors from reaching it.

There are cases which support this statement of the law from practically every State in the Union, many of which are cited in Prof. Scott's work. The same rule is stated in *Griswold on Spendthrift Trusts*, Sec. 471, *et seq.*

This is the same rule which is enunciated in *McColgran v. Magee*, 155 Pac. 995, 172 Cal. 182; *Carter v. American Trust Co.*, 147 N. E. 158, 82 Ind. A. 587; *Brown v. MacGill*, 87 Md. 161, 39 L. R. A. 806; *Forbes*

*v. Snow*, 140 N. E. 418, 245 Mass. 85; *Stephens v. Moore*, 249 S. W. 601, 298 Mo. 215; *Mackason's Appeal*, 42 Penna. 330, 82 Am. Dec. 517; *Ford v. Caldwell*, 22 S. C. L. 282.

These cases hold squarely that one can not create a spendthrift trust out of his own property for his own benefit. As stated in *Brown v. MacGill*, *supra*: A trust to place one's property beyond the reach of creditors, while retaining full enjoyment of the income through the instrumentality of a trustee, can not be created by any person. See also *Taylor v. Buttrick*, 165 Mass. 547, 52 A. S. R. 530.

Indeed, the very language employed by the courts in defining a spendthrift trust ought to be decisive of this question. The almost universal definition is that given by the courts of *Connecticut*, where this taxpayer resides. In *Carter v. Brownell*, 95 Conn. 216, the Supreme Court of Connecticut defines a spendthrift trust as:

"One which provides a fund for the benefit of another and which secures it against his improvidence and places it beyond the reach of his creditors."

In *Newcomb v. Masters*, 287 Ill. 26, 122 N. E. 85, 87, the Supreme Court of Illinois defines a spendthrift trust as:

"One created for the purpose of providing a fund for the benefit of another, and at the same time securing it against his own improvidence or incapacity for self-protection."

Almost identically the same definition is found in *Croom v. Ocala Company*, 62 Fla. 460, 57 S. 243;



*Wagner v. Wagner*, 149 Ill. App. 73, 91 N. E. 66;  
*Hoffman v. Beltzhoover*, 71 W. Va. 72, 76 S. E. 968;  
*Nunn v. Titcher Co.*, 245 S. W. 421 (Tex.).

In Maryland we find this definition:

“The founder of a trust may provide in direct terms that the property shall go to his *beneficiary* to the exclusion of his alienees, and to the exclusion of his creditors, such estates being commonly known as spendthrift trusts.” *Manders v. Mercantile Trust Co.*, 147 Md. 448, 128 A. 145.

It is equally clear that the owner of property can not create a spendthrift trust out of the *income* from such property for his own support. The rule is stated in *Scott on Trusts*, Sec. 156.1, as follows:

Sec. 156.1. *Trust for the settlor's support.* We have seen that where a trust is created for the support of a *beneficiary*, his creditors cannot reach his interest. Where, however, the settlor creates a trust *for his own support*, his creditors can reach his interest. The policy which prevents a person from creating a spendthrift trust for his own benefit also prevents his creating a trust under which his creditors are precluded from reaching the income or principal which is to be applied for his support. If the whole of the income was to be applied for the support of the settlor, his creditors can reach the whole of the income. If a specific sum was to be applied for the support of the settlor out of the income, or out of principal, his creditors can reach that sum. If the trustees were directed to pay to the settlor or to apply for his benefit so much of the income as might be necessary for his support, and the balance is payable to other beneficiaries, the court will ascertain the amount which would be necessary for his support and will direct the trustees to pay that amount to his creditors.



The rule laid down by Prof. Scott is cited with approval in *De Rousse v. Williams*, 181 Iowa 379, 164 N. W. 896 (1917), 9 Iowa L. Bull. 305 (1924); *Warner v. Rice and Knell, Trustees*, 66 Md. 436, 8 Atl. 84 (1887); *Bryan v. Knickerbacker*, 1 Barb. Ch. 409 (N. Y. 1846); *McLean v. Button*, 19 Barb. 450 (N. Y. 1854); *Sloan v. Birdsall*, 58 Hun 317, 11 N. Y. Supp. 814 (1890).

In short, we can summarize this doctrine of spendthrift trusts in three short propositions, to wit:

1. A spendthrift trust is the placing of property in trust by the owner thereof, the income from which is set aside for the use and benefit of another, who is restricted by its terms from disposing of it or subjecting it to his or her debts. *Carter v. Brownell, supra*; *Newcomb v. Masters, supra*; etc.

2. The owner of property cannot create a spendthrift trust of his own property for his own benefit. *Scott on Trusts*, Sec. 156; *Griswold, Spendthrift Trusts*, Sec. 471; *McColgran v. Magee, supra*; and cases above cited.

3. Notwithstanding the transfer or assignment of property to trustees for the benefit of the donor with provisions against alienation or the levy of creditors, such property can always be reached by the present or future creditors of the donor, and the donor can assign his interest. *Scott on Trusts*, Sec. 156; *City Bank Farmers Trust Co. v. Kennard*, 1 N. Y. S. (2d) 369.

The Board of Tax Appeals decided this issue solely upon the authority of the case of *C. P. Byrnes*, 39 B. T. A. 594. But that case is clearly distinguishable

upon its facts. Byrnes obviously attempted to include himself within the provisions of a spendthrift clause of a trust created by him, and that point was never in dispute. More than that, however, it appears from the record in that case that the question of law as to the power of Mr. Byrnes as donor to make himself the beneficiary of the spendthrift clause was not raised in that case—hence that issue was not passed upon by the Board in the *Byrnes* case.

Under the laws of Pennsylvania (where the *Byrnes* case arose) it is extremely doubtful whether Byrnes could legally make himself the beneficiary of a spendthrift trust of his own property. There are a number of Pennsylvania cases which hold that such a provision in a spendthrift trust would be invalid as being against public policy.

In *Holbrook's Estate*, 213 Pa. 93, the Court said, in passing on such a trust:

“In Pennsylvania a man may not settle his own property upon himself so as to keep it out of reach of his creditors, for that would lead directly to fraud.”

In *Nolan v. Nolan*, 218 Pa. 140, the Court said:

“A person *sui juris* cannot as against either present or future creditors settle his estate upon himself free from liability for their claims.” Citing *Patrick v. Bingman*, 2 Pa. S. Ct. 113; *Harvey v. Price*, 15 Pa. Dist. Rep. 144; and other Pennsylvania cases.

In *Mackason's Appeal*, 42 Pa. 330, 82 Am. Dec. 517, the Court in striking down the provisions of a spendthrift trust for the donor's benefit said:

“It would be a startling and revolutionary doctrine to hold that reserved interest cannot be



reached by the plaintiff as a creditor. If such is the law it would make it possible for a person free from debt to place his property beyond the reach of creditors and secure to himself a comfortable support during life without regard to his subsequent business ventures, contracts or losses. In Massachusetts and Pennsylvania it has been held that no such result can be accomplished." *Pacific National Bank v. Windham*, 133 Mass. 175.

In Connecticut the doctrine has apparently never been disputed that a spendthrift trust is limited in its application to *persons other than the donor of the trust*. As the Court said in *Mason v. Rhode Island Hospital Trust Co.*, 78 Conn. 85:

"The great current of modern authority in this country is to the effect that an equitable life estate under which the life tenant may have absolute right, may, by appropriate language, be created by one for the *benefit of another* which shall be inalienable by the *cesti que trust* and beyond the reach of creditors." Citing *Nichols v. Eaton*, 91 U. S. 716, and a host of other cases.

In short, we believe it is too plain for further argument that Mr. Huber, the taxpayer here, not only did not *intend* or *attempt* to include himself as a beneficiary of the spendthrift provision in Article Sixth, but also that he *could not* have done so as a matter of law, even if he had tried.

## ISSUE II.

**Did the transfers in question constitute irrevocable assignments by the taxpayer of his equitable interest in the trust income?**

The Board found it was "unnecessary to base the decision" upon this issue. Consequently the issue is before this Court for decision *de novo*, as it were.



Before the Board the Commissioner contended two things in regard to this issue: *first*, that the taxpayer, Mr. Huber, had no right to amend the trust and therefore could not add to the corpus of the trust; and, *second*, that the assignments in question did not constitute irrevocable transfers of property to the old trust, or were not sufficient to create new irrevocable trusts.

The *first* contention of the Commissioner simply overlooks the provisions of Article Sixteenth of the trust instrument, which reads as follows:

The Donor may, from time to time, sell, assign, transfer or deed over to the Trustee other and additional property which shall be held and distributed in the same manner as the property now subject to said trust, and upon the delivery of such additional property or evidence thereof to the Trustee, and subject to its acceptance, a supplemental schedule describing such property shall be prepared which, when identified by the signatures of the Donor and the Trustee shall be attached to and made a part of this Trust Indenture.

The Commissioner's argument also ignores the "Habendum Clause" of the trust instrument which clearly contemplates additions to the trust principal, and gives the Trustee the power to hold any other property "which may be added to and included by the Donor in Schedule A or any other schedules attached hereto and made a part hereof".

In the face of the provisions of Article Sixteenth and the Habendum Clause we do not anticipate any serious contention will be made by the Commissioner on that score.

The *second* contention of the Commissioner was that the assignments in question did not constitute either irrevocable assignments of property to the original trust, or new and irrevocable assignments. What are the facts?

1. The first and outstanding fact is that the parties themselves, to wit, the Donor and the Trustee, have treated the two notices of March 18, 1933, and March 3, 1934, as irrevocable assignments of the taxpayer's interest in the trust for the years in question. The Trustee has accepted the assignments as such, and the property so assigned has actually been added by the Trustee to the principal of the original trust. (R. 34.)

The conduct of the parties to a transaction is always persuasive evidence of the nature of that transaction. If the parties immediately concerned, *i. e.*, the Donor and the Trustee have dealt with these two assignments as if they were absolute and irrevocable, the Courts will give great weight to their conduct as indicative of their intentions. See *United States v. Lowery*, 206 U. S. 206; *Elting v. Sturtevant*, 41 Conn. 176; *French v. Pearce*, 8 Conn. 439; 13 *C. J. Contracts*, Sec. 517 and cases there cited.

2. The second fact to note in this connection is that the taxpayer's notices of March 18, 1933 and March 3, 1934, were in and of themselves adequate and sufficient to authorize the Trustee to make the transfer in question. It is clear that such documents do not have to be under seal, or formally acknowledged by the Trustee, provided the Trustee recognizes the assignment in any manner and accepts the obligations of the trust



thus created, which of course the Trustee here has done. (R. 33, 34.)

No formal instrument of any kind is required even to create a new trust *ab initio* where *personal property* forms the corpus of the trust. "A trust of personal property may be created and established, or engrafted on to a written instrument by parol \* \* \* and a trust created by parol is valid if it relates only to personal property at the time of its creation, even though it subsequently affects real property." 65 *C. J. Trusts*, Sec. 37. Such is the rule in Connecticut where this trust was created. *McDonald v. Hartford Trust Co.*, 104 Conn. 169, 132 A. 902.

In this case, of course, we have the two written assignments of March 18, 1933, and March 3, 1934, as well as the prior written assignment of December 31, 1932, which is not questioned. In other words, the taxpayer advised the Trustee not once, but upon three separate occasions, each in writing, that he desired to transfer his *right to the trust income for the ensuing year* to the Trustee, and to add the funds to the trust principal. The Trustee accepted the directions of the taxpayer as binding upon him, and actually added the property to the trust principal, and the necessary entries upon its trust records. No more than that could legally be required in order to hold the Trustee for its responsibility either to the grantor or to the beneficiaries of the trust. 65 *C. J. Trusts*, Sec. 76; *McBride v. McIntire*, 51 N. W. (Mich.) 1113. Why should any more be required of the taxpayer here?

3. The third fact which must be noted in this connection is that the contract between the parties as to



these three assignments is a fully executed and completed one from which neither party can withdraw. The transfers so made are now *fait accompli*—already done, and they can not now be undone by either the Donor or the Trustee, because the Donor's wife and children as *cestuis que trust* have now acquired a *vested interest* in that property. They can not be deprived of that property by anything the taxpayer can do now. That is the best test of whether an assignment of property is irrevocable or not. It belongs to the person who can maintain right and title to it in a court of equity—obviously here the wife and children of the taxpayer, and not the taxpayer himself. *Union Trust Co. v. Watrous*, 109 Conn. 268, 146 A. 727; 65 C. J. Trusts, Sec. 266—

No question can arise in this case and no argument can tenably be made that a valid and legal trust was not created by these three notices of the taxpayer to the Trustee. The subsequent conduct of both the taxpayer and the Trustee with relation to the trust property has been such that either party would be *estopped* to deny their relationship to the trust property and to each other. The fact remains that the property in question is *now in trust*, and has been ever since those three notices were delivered. Sec. 65 C. J. Trusts, Sec. 276 and cases cited.

Did these irrevocable assignments relieve the taxpayer from income tax upon the trust income during the years in question?

The principal of law involved here has been definitely settled since the case of *Blair v. Commissioner*, 300 U. S. 5, 81 L. ed. 465. That principle is simply this:

One entitled under the terms of a trust to the net income during his life becomes the owner of an equitable interest in the corpus of the trust property, which interest is alienable like any other property, and if assigned or transferred relieves the assignor from taxation thereon.

Or, as more precisely stated in *Blair v. Commissioner, supra*, at page 471:

“The will creating the trust entitled the petitioner during his life to the net income of the property held in trust. *He thus became the owner of an equitable interest in the corpus of the property.* Brown v. Fletcher, 235 U. S. 589, 598, 599, 59 L. ed. 374, 378, 35 S. Ct. 154; Irwin v. Gavit, 268 U. S. 161, 167, 168, 69 L. ed. 897, 898, 899, 45 S. Ct. 475; Senior v. Braden, 295 U. S. 422, 432, 433, 79 L. ed. 1520, 1525, 1526, 55 S. Ct. 800, 100 A.L.R. 794; Merchants’ Loan & T. Co. v. Patterson, 308 Ill. 519, 530, 139 N. E. 912. By virtue of that interest he was entitled to enforce the trust, to have a breach of trust enjoined and to obtain redress in case of breach. *The interest was present property alienable like any other*, in the absence of a valid restraint upon alienation. Commissioner of Internal Revenue v. Field (C. C. A. 2d) 42 F. (2d) 820, 822; Shanley v. Bowers (C. C. A. 2d) 81 F. (2d) 13, 15. The beneficiary may thus transfer a part of his interest as well as the whole. See Am. Law Inst. Restatement, Trusts, vol. 1, secs. 130, 132 *et seq.* The assignment of the beneficial interest is not the assignment of a chose in action but of the ‘right, title and estate in and to property.’ Brown v. Fletcher, 235 U. S. 589, 59 L. ed. 374, 35 S. Ct. 154 *supra*; Senior v. Braden, 295 U. S. 422, 79 L. ed. 1520, 55 St. Ct. 800, 100 A. L. R. 794, *supra*. See 1 Bogert, Trusts & Trustees, sec. 183, pp. 516, 517; 17 Columbia L. Rev. 269, 273, 289, 290.

“We conclude that the assignments were valid, that the assignees thereby became the owners of



*the specified beneficial interests in the income, and that as to these interests they and not the petitioner were taxable for the tax years in question."* (Italics supplied.)

There—in the opinion of the Supreme Court itself—lies this whole case in a nut shell. If we take the four propositions laid down by the Supreme Court in that opinion one by one, we find that this case fits squarely into each of them. Thus:

1. Mr. Huber was certainly entitled to receive the trust income during his lifetime. It follows that he "thus became the owner of an equitable interest in the corpus of the property", squarely within the meaning of *Blair v. Commissioner*.

2. That "equitable interest" which Mr. Huber owned was "present property alienable like any other property", squarely within the meaning of *Blair v. Commissioner*. We have already seen above that Mr. Huber was *not* restrained by the trust instrument from alienating his interest.

3. Mr. Huber could therefore "transfer a *part* of his interest, as well as the whole". That is precisely what Mr. Huber did. He assigned absolutely and irrevocably to the Trustee his right to receive the trust income for a term of years. That was a "part of his interest" in the trust property, again squarely within the meaning of *Blair v. Commissioner*. See exactly on this point *Ellen S. Booth*, 36 B. T. A. 141.

4. Having assigned his right to receive the trust income for a term of years to other beneficiaries, "they



and not the petitioner were taxable for the tax years in question", again squarely within *Blair v. Commissioner*.

When we turn to the provisions of the assignments in question here, we find that they are simple and outright transfers of the taxpayer's right to receive the income from the trust for a total period of approximately three years, from March, 1932 to March, 1935. (R. 42, 43). The language of the three assignments is simple and direct:

"I hereby authorize and instruct you to charge income account on the trust established by me under date of March 4, 1931 \* \* \*"

"I further authorize and instruct you to credit such amounts to the principal of said *irrevocable* trust fund."

"This is to instruct you to make the following transfers from income to principal during the fiscal year ending March 4, 1934."

It is obvious that the language of the three assignments operated to transfer to the Trustee the legal *right* to receive the income for the period in question. *Brown v. Fletcher*, 235 U. S. 589. At the time these assignments were made the income itself was not yet earned, hence the only thing which the taxpayer could assign was his *right to receive* that income. 1 *Bogert, Trusts*, Sec. 183. Indeed, in legal effect an assignment of this sort always transfers not the property itself, but the *right* to the property. *Senior v. Braden*, 295 U. S. 422. That *right* is the thing which passes; not the funds themselves. Indeed, the funds may *never* pass, due to some subsequent mishap. But that would not affect the passing of the *right* to the funds—perhaps years earlier.

After the assignments in question were delivered to the Trustee, Mr. Huber as donor no longer had any *right*, legal or equitable, to receive the trust income during the years specified. The only person who had that *right* was the Trustee, but he held that right for the sole use and benefit of the Donor's wife and children.

The only remaining question is whether the taxpayer's assignment of his *right* to the trust income when *limited for a specific period*, affected the irrevocable character of the assignments. This question has been before the Board of Tax Appeals in several cases. One of the most recent cases is that of *Meredith Wood*, 37 B. T. A. 1065, which was affirmed by the Circuit Court of Appeals, Second, in 104 F. (2d) 1013.

In that case the taxpayer in 1931 created a trust naming his wife as beneficiary of the income therefrom, but did not reserve any power to revoke the trust, nor could the income be accumulated for his future benefit, the trust to operate for a period of three years only. A supplemental amendment extended the period for two additional years. In holding the taxpayer non-taxable on the trust income for said years the Board said:

"In neither the original nor the supplementary declaration of trust was any power of revocation reserved to the petitioner or anyone else. The trust could be terminated only upon the happening of one of the three events specified in the original and supplementary declarations, viz., the death of the grantor or of the beneficiary, or *the termination of a five-year period from April 8, 1931, and petitioner, the grantor, had no control over the happening of such events.* The trust constituted



the grant of an estate for years and the beneficiary became the owner of an equitable interest in the corpus, *Blair v. Commissioner*, 300 U. S. 5. Since section 166, *supra*, deals only with revocable trusts, and since the trust here in question was not, under the terms of the instruments creating it, revocable at any time during the period fixed for its duration, that section is not applicable in the instant case. *Phebe Warren McKean Downs*, 36 B. T. A. 1129. Cf. *William E. Boeing*, 37 B. T. A. 178."

As to the year 1933, which is involved here, there should be no question whatever as to the correctness of the taxpayer's position. Under all revenue acts prior to the Act of 1934 there was practically no dispute as to the validity or irrevocability of trusts for a limited time only. There are numerous decisions under the prior acts which hold that a transfer in trust for a limited period may constitute an irrevocable trust wherever the limitation expires *pursuant to the terms of the trust instrument itself* and the grantor has *no control* over the property during the period provided for in the instrument. See *Robert Allerton*, 13 B. T. A. 1383; *Ellen S. Booth*, 36 B. T. A. 141, and cases there cited.

In the case of *Ellen S. Booth*, *supra*, the Board considered this entire question of the power of the beneficiary of a trust to transfer or assign his right to receive the income of the trust. The Board met the issue squarely as to whether such a transfer of trust income constituted the assignment of present property or a right to property, or was merely an assignment of future income. The Board reviewed the *Blair* case, *supra*, the *Grace S. Clark* case, 16 B. T. A. 453, the *Mabel Ashforth* case, 26 B. T. A. 1188, and the *Power*



case, 23 B. T. A. 428. Squarely in point and meeting the issue herein in every respect as to the limited period of the assignment the Board said:

"The respondent contends that the *Clark* case, *supra*, is not applicable here on the ground that the assignment in that case was irrevocable whereas the assignment herein by its terms was revocable by the petitioner. *A beneficiary may transfer a part of his interest as well as the whole. Blair v. Commissioner, supra.* Although the assignment was revocable by the petitioner, it was in effect an assignment for a term of years, since it could be revoked only to terminate at the end of the calendar year in which notice of revocation was given. Had the petitioner revoked the assignment in 1931, it would not have been effective until the end of the year 1931, and the same is true as to the year 1932, as disclosed by the facts. She revoked the assignment in October 1932, effective as of January 2, 1933. The assignee under the provisions of the assignment was entitled to receive one-half of the income for a year certain and thereafter from year to year until revoked, and in the event of revocation, until the end of the year in which revoked. *It had the right to enforce the payment to it by the trustees under the assignment of one-half of the income for 1931 and 1932.* It became by virtue of the assignment a beneficiary of the trust to the extent of the *interest assigned*. 'The one who is to receive the income as the owner of the beneficial interest is to pay the tax.' *Blair v. Commissioner, supra.* In our opinion the Cranbrook Foundation received the income during 1931 and 1932 as the owner thereof. *Cf. United States v. First National Bank of Birmingham, 74 Fed. (2d) 360.*" (Emphasis supplied.)

It is to be noted that the Board did not base its decision in the *Booth* case upon the somewhat narrower provisions of the prior revenue acts than those which are found in Section 166, Revenue Act of 1934. The

Board based its opinion upon the broad principle that the *interest of the owner* of the income of a trust for a term of years or for life is an *equitable interest* or *present right of property*, which is the subject of transfer or conveyance like any other property right, and once conveyed by irrevocable act relieves the assignor from taxation thereon. In other words, the *Booth* case did *not* turn upon the words "within the taxable year" found in Section 166, Revenue Act of 1932, which words are omitted from the Revenue Act of 1934.

This is also made manifest in the *Meredith Wood* case, *supra*, where Section 166 of the Revenue Act of 1934 was involved. Notwithstanding the fact that the Commissioner urged that the omission of those words in the 1934 Act was sufficient ground for distinguishing the *Wood* case from the long list of cases cited above, the Board denied the Commissioner's argument and followed the *Blair* case and the principle of that case. The Board also cited at length the case of *United States v. First National Bank of Birmingham*, 74 F. (2d) 360, which holds that in such trusts, where the right to property is assigned for a definite period, the assignor has *no power* "during the taxable year or at any other time" to *revest in himself title to any part of the property so assigned*, even though the trust which had been created for a period of only one year terminated during the taxable year in question.

As a matter of fact *almost identical assignments* have been sustained as irrevocable assignments by the Board of Tax Appeals in several cases. In *Yolanda v. Perkins*, 38 B. T. A. 189, the assignment read:



“In pursuance of the provisions of Articles 5th and 6th of the Will of Frederic Perkins you are hereby directed from and after this date to pay the net income from said trust to my two daughters in equal shares.”

In *Edith H. Blaney*, 13 B. T. A. 1315, the assignment read as follows:

“I request that from this date you make payments of income which by the terms of the will would be payable to me, in accordance with these assignments, and I release you from all liability arising from your following this request.”

In *Grace Scripps Clark*, 16 B. T. A. 453, the assignment read:

“That the party of the first part \* \* \* does by these presents give, grant, alien and confirm unto the said second party \* \* \* one-half interest in all income” etc.

In *Ellen S. Booth*, 36 B. T. A. 141, the taxpayer assigned to Cranbrook Foundation “one-half of all interest and estate together with all *payments and distributions* which shall hereafter be made in respect of said one-half of said first party in and under Sections (c) and (d).”

The Board held that every one of the above assignments was irrevocable and relieved the assignor from taxation thereon. The *Perkins* case is strikingly similar in the language employed, to the assignments made by Mr. Huber here. In the *Perkins* case the Board said:

“Thus it appears that the petitioner is being taxed upon income which she did not receive and which she had no right to receive after her direc-



tion to the trustee to pay it to another. The respondent defends this on the ground that the direction was revocable. But there was no reservation by her of a right to revoke and *no qualification of her exercise of the power to direct payment to the children. The direction was beyond recall.* After the direction of October 1, 1934, the power was extinguished and petitioner no longer had any control over the trust income either to direct it to herself or to anyone else. *Cf. Lelia W. Stokes*, 28 B. T. A. 1245; *Ellen S. Booth*, 36 B. T. A. 141 (on review C. C. A., 6th Cir.). Moreover, had there been doubt as to the intention that the direction of October 1, 1934, should have permanent effect, it was set at rest by a later confirmation in writing, dated December 11, 1936.

“The petitioner was, after October 1, 1934, not a beneficiary of the trust, had no right to the trust income, and did not in fact receive it. The Commissioner was in error in including it in her income, and the determination is reversed.”

In other words, the mere fact that a trust is for a term of years only confers *no power of revocation* upon the grantor *so long as the trust continues*, and the income from such a trust is not taxable to the grantor even though the trust expires and terminates during the taxable year.

There was no possibility of reverter in this case. The property here assigned became a part of the trust principal irrevocably, and under no contingency could it have become vested in the taxpayer again. This is not a case of where the trust itself was limited to a term of years. This trust continued under all events until the death of the taxpayer. Once the property assigned became a part of the corpus of the trust, it was held by the Trustee thereafter throughout the life of the trust,

viz., until the death of the taxpayer. In other words, although the two assignments in question of March 18, 1933 and March 3, 1934, were for two years only, the subject matter of those assignments was alienated forever from the taxpayer or his estate, and could not revert to him. *Cf. William E. Boeing*, 37 B. T. A. 178, in which it is held that the bare possibility of the prior decease of all the ultimate beneficiaries can not be construed as a right of accumulation within the meaning of Section 167. See *Preston R. Bassett*, 33 B. T. A. 182. In the instant case it is to be noted that there is no provision whatever in the trust instrument for reverter to the grantor or his estate *under any circumstances*.

We respectfully submit that the assignments in this case were not transfers of personal earnings or future income, but were assignments of taxpayer's *equitable interest* in the trust—his *right* to receive the income therefrom; that such assignments constituted the transfer of recognized property rights; and that once accepted by the Trustee the assignments became executed and binding contracts which neither the taxpayer nor the Trustee could revoke or change. The income resulting from said assignments, therefore, never became income to the taxpayer because he did not own the right to receive it during the period in question. Hence it was not taxable to the petitioner.

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FILED JAN 29 1940

*Joseph W. Stewart*

CLERK

No. 7548

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**In the United States Court of Appeals for the  
District of Columbia**

OCTOBER TERM, 1939

ERNEST HUBER, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF A DECISION OF THE UNITED  
STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

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**In the United States Court of Appeals for the  
District of Columbia**

OCTOBER TERM, 1939

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No. 7548

ERNEST HUBER, PETITIONER

*v.*

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, RESPONDENT

---

*ON PETITION FOR REVIEW OF A DECISION OF THE UNITED  
STATES BOARD OF TAX APPEALS*

---

**BRIEF FOR THE RESPONDENT**

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**OPINION BELOW**

The memorandum opinion of the Board of Tax Appeals (R. 11-14) is unreported.

**JURISDICTION**

This proceeding involves a deficiency in income taxes of \$1,105 and \$1,084.11 for the calendar years 1933 and 1934, respectively. (R. 11.) From a decision of the Board of Tax Appeals entered May 29, 1939 (R. 14), and a final order dated July 13, 1939 (R. 25), denying the motion of the taxpayer (R. 15) for reconsideration of the Board's opinion, the case is brought to this Court by a petition for review (R. 26-31) filed on October 6,



1939, under stipulation of counsel (R. 25-26) pursuant to Sections 1141-1142 of the Internal Revenue Code.

#### QUESTIONS PRESENTED

1. Was there a valid assignment by taxpayer of the income of an irrevocable trust payable to him as donor and life beneficiary which would prevent taxation to him of that income?

2. Did the letters of instruction to the trustee create new irrevocable trusts of the trust income which was payable to the taxpayer as life beneficiary of the trust income?

3. Was the donor a "beneficiary" under the spend-thrift clause of the trust, prohibiting the alienation or disposition of the interest of any beneficiary, so that the income of the trust was taxable to the donor as life beneficiary?

#### STATUTES INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

##### SEC. 22. GROSS INCOME.

(a) GENERAL DEFINITION.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. \* \* \*

# SEC. 161. IMPOSITION OF TAX.

(a) APPLICATION OF TAX.—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

\* \* \* \* \*

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

\* \* \* \* \*

# SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

\* \* \* \* \*

(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year; \* \* \*



Sections 22, 161 and 162 of the Revenue Act of 1934, c. 277, 48 Stat. 680, contain provisions substantially the same as those of the corresponding sections of the Revenue Act of 1932 above quoted.

#### STATEMENT

The facts were stipulated before the Board. (R. 32-35.) The trust agreement (R. 35-42) and the letters of direction to the trustee (R. 42-44) are appended thereto. They may be summarized as follows:

On March 4, 1931, the taxpayer, as donor, created an irrevocable trust designating the Bridgeport City Trust Company of Connecticut as trustee with full powers to invest and reinvest the trust funds. (R. 33.)

Paragraph "Seventeenth" (R. 39-40) of the trust agreement provides that the "entire net income" of the trust be paid quarterly to the donor—taxpayer "during his lifetime." Upon the death of the donor the trustee was directed to divide the trust estate into four equal parts, to be held separately in trust, to pay the net income of one-fourth to donor's wife, for life or until she remarried, and to spend so much of the net income of the other three parts for the support, maintenance and education of donor's children until they reached the age of 21, and thereafter to pay the net income to such child or children until the age of 30, when the principal was to be distributed to such child or children. (R. 40-41.)

Paragraph "Fourteenth" of the trust agreement (R. 39) provides that the donor "expressly surrenders all right and power to amend, modify or revoke this trust, in whole or in part."



Paragraph "Fifteenth" (R. 39) provides that upon execution of the trust the donor "shall have no power over the disposition and distribution of the principal and income thereof."

Paragraph "Sixth" (R. 37) of the trust agreement provides that "neither the principal nor the income of the trust funds shall be liable for the debts of any beneficiary" nor "subject to seizure by any creditor of any beneficiary" and "no beneficiary hereunder shall have any power to sell, assign, transfer, encumber or in any other manner to anticipate or dispose of his or her interest in the trust funds or the income produced thereby."

On March 18, 1933, the donor wrote the Trust Company, as trustee, as follows (R. 12, 43):

This is to instruct you to make the following transfers from income to principal during the fiscal year, ending March 4th, 1934:

Balance of income June 4, 1933

Balance of income Sept. 4, 1933

Balance of income Dec. 4, 1933

Balance of income Mar. 4, 1934

These amounts, when so transferred, are to become a part of the principal of the fund and are to be deposited in your Savings Department.

On March 3, 1934, petitioner wrote an identical letter to the trustee with respect to the balances of income accruing at the close of the four quarters of the fiscal year ending March 4, 1935. (R. 12, 43-44.)

In accordance with these directions, the trustee transferred to corpus of the trust the income in each

year, which aggregated the sum of \$7,676.52 for the year 1933 and \$8,313.59 for the year 1934. (R. 12.)

In determining the deficiencies found, the Commissioner included the above amounts in the donor's income for the years in question. The Board of Tax Appeals sustained the action of the Commissioner and taxpayer appealed to this Court.

#### SUMMARY OF ARGUMENT

No valid assignment of trust income was made by the taxpayer. A letter of instruction as to disposition of income to be received is not an assignment. An assignment must have the essential elements of a contract. Here there was no designated assignee. The alleged assignment could be revoked.

The letters of direction to the trustee did not create two new irrevocable trusts nor add to the corpus of the existing trust so as to relieve the donor of tax liability. The donor had no power to create new trusts nor to add to the corpus of the old trust until the trust income had first been distributed to him by the trustee.

This was a spendthrift trust, the terms of which were binding on the donor. It was irrevocable. Donor was the life beneficiary. Both the spendthrift clause, paragraph "Sixth", and the restrictions over the disposition of income, paragraph "Fifteenth", were binding on the donor. While not binding on donor's creditors, the restrictive provisions are binding on the donor himself.

Under the decided cases the income of the irrevocable trust was taxable to the donor. The income was his to command. The taxpayer must first receive the income of the trust before he could make a further



disposition. His rights as to disposition were restricted under the trust provisions. The purported assignment could not relieve the donor from taxation on his trust income. He could make no assignment or transfer *in praesenti* until after he had actual possession and receipt of that income because of the restrictions imposed by the trust. The income of the trust was taxable to the donor as life beneficiary.

## ARGUMENT

### I

No valid assignment in fact or in law was made by the taxpayer which would prevent taxation to him of the income of the irrevocable trust as the life beneficiary thereof

There was no assignment in fact in the instant case but merely a direction to the trustee as to the disposition of income of the taxpayer.

An assignment does not differ in its essential elements from any other contract. *Commercial Bank v. Rufe*, 92 Fed. 789, 795 (W. D. Va.), affirmed, 99 Fed. 650 (C. C. A. 4th). *In re Dier*, 296 Fed. 816, 820 (C. C. A. 3d), certiorari denied, *sub nom.*, *Ehrich v. Eisenlohr*, 265 U. S. 584; *In re Landis*, 41 F. (2d) 700, 702 (C. C. A. 7th), certiorari denied, *sub nom.*, *Farmers Bank v. Bickenbach*, 282 U. S. 872.

A letter of direction is not an assignment. *Farmers' Bank v. Hayes*, 58 F. (2d) 34, 37 (C. C. A. 6th), certiorari denied, 287 U. S. 602. A clear intention to make an assignment must be expressed and the assignor must not retain any control over the fund or any power of revocation. *Farmers Bank v. Blount*, 8 F. (2d) 443, 446 (C. C. A. 4th); *Christmas v. Russell*, 14 Wall. 69, 84; *Removal Cases*, 100 U. S. 457, 477; *Rufe v. Commercial Bank*, 99 Fed. 650, 652-653 (C. C. A. 4th).



In *Lust v. Miller*, 4 F. (2d) 293, this Court laid down the principle that an equitable assignment of a specific sum in the hands of a third person does not apply where assignor notified a third party to pay assignee, without any understanding with assignee, as the latter was not in privity with any parties to the transaction.

Elements of a valid assignment are lacking in that there is no designated assignee. Furthermore, the alleged assignor could revoke his mere direction to the trustee, provided he ever had the original power to make any assignment.

However, the direction to the trustee to transfer to corpus future income receivable by the taxpayer as life beneficiary did not divest taxpayer of any property interest in the trust by way of a valid assignment. It amounted to no more than an attempt to divest income prior to its receipt. By so doing, the taxpayer does not escape the incidence of the tax. *Longyear v. Helvering*, 77 F. (2d) 116, 64 App. D. C. 238; *McDonald v. Helvering*, 74 F. (2d) 1005, 64 App. D. C. 92; *Lansill v. Burnet*, 58 F. (2d) 512, 61 App. D. C. 107; *Bishop v. Commissioner*, 54 F. (2d) 298 (C. C. A. 7th); *Rosenwald v. Commissioner*, 33 F. (2d) 423 (C. C. A. 7th), certiorari denied, 280 U. S. 599; *Reynolds v. McMurray*, 60 F. (2d) 843 (C. C. A. 10th), certiorari denied, 287 U. S. 664; *Power v. Commissioner*, 61 F. (2d) 625 (C. C. A. 8th); *Brainard v. Commissioner*, 91 F. (2d) 880 (C. C. A. 7th).

This is a far different situation from that of a valid assignment of a property interest in a trust fund which was involved in *Blair v. Commissioner*, 300 U. S. 5, discussed *infra*.

Had there been any intention to make an irrevocable assignment of taxpayer's interest in the trust, it would have been very simple to express that intent in apt language.

## II

### The letters of instruction to the trustee did not create new irrevocable trusts

To argue that the letters of instruction to the trustee created new irrevocable trusts seems on its face to be so far-fetched as to require little answer.

Having first created an irrevocable trust by a very formal document, the provisions of which the taxpayer immediately proceeded to violate, if the argument he makes is sound, he now urges that the informal letters of instruction to the trustee created new irrevocable trusts. The letters speak for themselves. Neither in form nor expressed intention is there anything to support the theory of two new irrevocable trusts either by grafting on the old or creation of the new.

There was no power in the donor to create new trusts or to add to the corpus of the old trust until the trust income had first been distributed to him by the trustee. Not until then could he exercise the reserved power under paragraph "Sixteenth" (R. 39) of the trust to add to the old trust nor could the trustee take under the *habendum* clause (R. 35-36).

A trust cannot be established in personal property not owned by the donor at the time of the declaration of the trust but which is to be acquired in the future, such as future profits. To create a trust the *res* must be in existence for until then there is no trust but a mere



promise, without a valuable consideration, to create a trust in the future. An interest which has not come into existence cannot be held in trust. *Brainard v. Commissioner*, 91 F. (2d) 880 (C. C. A. 7th); Restatement of the Law of Trusts, Vol. 1, Section 75.

This question is discussed at length in the *Brainard* case, *supra*, with the resulting conclusion that the future income must first be received by the trustor before it becomes *res* of the trust. Thus the amount is properly taxable to the trustor as the incidence of the tax falls before the income becomes trust *res*.

### III

**This was a "spendthrift" trust and the provisions prohibiting alienation of the interest or income of any beneficiary were binding on the taxpayer so that the income of the trust was taxable to the donor as life beneficiary**

The trust in the case at bar was irrevocable. (Par. "Fourteenth", R. 39.) The donor was the life beneficiary of the income. (Par. "Seventeenth (A)", R. 40.) The trust agreement (par. "Sixth", R. 37) contained a "spendthrift" clause applicable to all beneficiaries.<sup>1</sup> That clause prohibited any beneficiary from assigning or transferring or disposing of his interest in the trust funds or the income produced thereby. It applies to any and all beneficiaries. It included and

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<sup>1</sup> Sixth: Neither the principal nor the income of the trust funds shall be liable for the debts of any beneficiary hereof, nor shall the same be subject to seizure by any creditor of any beneficiary under any writ or proceeding at law or in equity, and no beneficiary hereunder shall have any power to sell, assign, transfer, encumber or in any other manner to anticipate or dispose of his or her interest in the trust funds or the income produced thereby.



was binding upon the taxpayer-donor as one of the beneficiaries.

This is clearly shown by reference to paragraph "Fifteenth" (R. 39) of the trust.<sup>2</sup> It states in no uncertain terms that the "Donor \* \* \* shall have no power over the disposition and distribution of the principal and income" of the trust.

The taxpayer as donor and beneficiary of the trust is bound by the provisions of the irrevocable trust agreement, resulting from his own voluntary act. What was done by the parties to the trust agreement is controlling. *Weiss v. Stearn*, 265 U. S. 242, 254; *United States v. Phellis*, 257 U. S. 156, 172; *Remington Rand, Inc. v. Commissioner*, 33 F. (2d) 77, 79 (C. C. A. 2d), certiorari denied, 280 U. S. 591.

The taxpayer's approach to the question of whether the spendthrift clause applies to the taxpayer-donor is from the viewpoint of a creditor and embodies the theory of a fraud upon taxpayer's creditors. It is submitted that such an approach is in error. Creditors are not here involved.

But admitting, for the purposes of argument, that the taxpayer could not put his worldly goods beyond the reach of his own creditors, nevertheless for tax purposes the spendthrift clause, as well as paragraph "Fifteenth", is binding on the taxpayer as donor and beneficiary of the trust.

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<sup>2</sup> Fifteenth: Although upon the execution of this agreement no part of the corpus of this trust shall be or remain in the Donor, and although upon the execution hereof he shall have no power over the disposition and distribution of the principal and income thereof, \* \* \*.

The Connecticut statutes applicable to spendthrift trusts are Connecticut Public Acts (1899), c. 210, p. 1119; Connecticut General Statutes (1918), Sections 5872-5875; Connecticut General Statutes (Revision of 1930), Section 5723. The statute in its present form is set out below.<sup>3</sup>

Spendthrift trusts are recognized in Connecticut and the provisions of such a trust prohibit the assignment of income by a beneficiary. In *Bridgeport-City Trust Co. v. Beach*, 119 Conn. 131, 174 Atl. 308, the court refused to recognize as valid an assignment of income by a beneficiary, saying (p. 141):

As the income is expressly given for the support of the beneficiary, and there is express authorization to the trustee to withhold income, this is clearly a spendthrift trust, within the provisions of § 5723 of the General Statutes, and the income is not liable to attachment or execution by creditors of the beneficiary, and may not be alienated or assigned by him. *Cromwell v. Converse*, *supra*, p. 425; *Foley v. Hastings*, 107 Conn. 9, 16, 139 Atl. 305; *Carter v. Brownell*, 95 Conn. 216, 111 Atl. 182. The defendant Sand virtually con-

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<sup>3</sup> § 5723. Whenever property shall have been given to trustees to pay over the income to any person, without provision for accumulation or express authorization to the trustees to withhold such income, and the income shall not have been expressly given for the support of the beneficiary or his family, such income shall be liable in equity to the claims of all creditors of such beneficiary. \* \* \* When any such trust shall have been expressly provided to be for the support of the beneficiary or his family, a court of equity having jurisdiction may make such order regarding the surplus, if any, not required for the support of the beneficiary or his family, as justice and equity may require. \* \* \*



cedes that the assignment to him is ineffective as such, but suggests that it be regarded as an order or contract, *in futuro*, to pay the debt out of accumulated income. This is disposed of adversely by our holding, under question five, that Stanley has no rights in that accumulation.

See also: *Middletown Trust Co. v Gaffey*, 96 Conn. 61, 70, 112 Atl. 689.

That the provisions of a spendthrift trust are binding on the grantor or donor of the trust, but not as to his creditors, is well established. This principle is stated in Ruling Case law, Vol. 25, Spendthrifts and Habitual Drunkards, Section 6, as follows:

6. *Trust for Benefit of Donor.*—Since a person sui juris and solvent may make any disposition of his property which he may wish, provided the disposition is absolute, and does not impair the rights of existing creditors, and is not made with the fraudulent purpose of defrauding subsequent creditors, the validity of a trust created by one for his own benefit is recognized where creditors or other third persons are [not] injuriously affected thereby.<sup>15</sup> A very different question arises, however, when the rights of creditors intervene. The general rule is that an owner of property who remains sui juris, whether he is or is not a spendthrift, cannot dispose of his property, in trust or otherwise, in such a manner as to exempt it from liability for his lawful debts; and therefore, where the owner of property, even though he is in fact a spendthrift, conveys the same in trust for his own use and benefit, the conveyance, *while valid and binding as to the grantor*, is absolutely void as to existing or subse-



quent creditors.<sup>16</sup> This rule is based, not upon technical grounds, but upon sound reasons of public policy. \* \* \* [Italics and the word "not" supplied.]

The cases cited in support of the above statements are set out in the footnotes below:

<sup>15</sup> *Taylor v. Buttrick*, 165 Mass. 547, 43 N. E. 507, 52 A. S. R. 530; *Ghormley v. Smith*, 139 Pa. St. 584, 21 Atl. 135, 23 A. S. R. 215 and note, 11 L. R. A. 565 and note; *Nolan v. Nolan*, 218 Pa. St. 135, 67 Atl. 52, 12 L. R. A. (N. S.) 369 and note.

NOTE.—19 Ann. Cas. 274.

<sup>16</sup> *Brown v. Macgill*, 87 Md. 161, 39 Atl. 613, 67 A. S. R. 334 and note, 39 L. R. A. 806; *Scott v. Keane*, 87 Md. 709, 40 Atl. 1070, 42 L. R. A. 359; *Taylor v. Buttrick*, 165 Mass. 547, 43 N. E. 507, 52 A. S. R. 530; *McIlvaine v. Smith*, 42 Mo. 45, 97 Am. Dec. 295; *Graff v. Bonnett*, 31 N. Y. 9, 88 Am. Dec. 236; *Schenck v. Barnes*, 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395; *Mackason's Appeal*, 42 Pa. St. 330, 82 Am. Dec. 517; *Ghormley v. Smith*, 139 Pa. St. 584, 21 Atl. 135, 23 A. S. R. 215 and note, 11 L. R. A. 565 and note; *Nolan v. Nolan*, 218 Pa. St. 135, 67 Atl. 52, 12 L. R. A. (N. S.) 369 and note; *Petty v. Moores Brook Sanitarium*, 110 Va. 815, 67 S. E. 355, 19 Ann. Cas. 271 and note, 27 L. R. A. (N. S.) 800. And see CREDITORS' BILLS, vol. 8, p. 9 *et seq.*

The taxpayer, as a designated beneficiary, was bound by the restrictions expressly provided by the trust instrument. *King v. United States*, 84 F. (2d) 156, 158 (C. C. A. 1st). Therefore he could not make a valid assignment of any income from the trust until he had first received that income from the trustee. His purported assignment or direction to the trustee could only be valid as authorized by the trust provisions after he had received the income. Under such circumstances, the trust income was taxable to him.

As shown above, the restrictions of the trust instrument prevented the taxpayer from making a valid assignment and for tax purposes the income must first be received by him before any disposition could be made by him. The donor cannot avoid the incidence of the tax merely by a direction to the trustee that his share of the income of the trust be accumulated as corpus.

This case is ruled by the principle announced in *Corliss v. Bowers*, 281 U. S. 376, where the Court said (pp. 377-378):

There can be no doubt either that the statute purports to tax the plaintiff in this case. But the net income for 1924 was paid over to the petitioner's wife and the petitioner's argument is that however it might have been in different circumstances the income never was his and he cannot be taxed for it. The legal estate was in the trustee and the equitable interest in the wife.

But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid. If a man directed his bank to pay over income as received to a servant or friend, until further orders, no one would doubt that he could be taxed upon the amounts so paid. It is answered that in that case he would have a title, whereas here he did not. But from the point of view of taxation there would be no difference. The title would merely mean a right to stop the payment before it took place. The same right existed here although it is not called a title but is called a power.  
\* \* \* The income that is subject to a man's unfettered command and that he is free to enjoy



at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not. \* \* \*

In the recent case of *Griffiths v. Helvering*, decided by the Supreme Court December 18, 1939, not yet officially reported but found in 1940 C. C. H., Vol. 4, p. 9342, that principle is reiterated as follows (p. 9343):

We cannot too often reiterate that "taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid." *Corliss v. Bowers*, 281 U. S. 376, 378. And it makes no difference that such "command" may be exercised through specific retention of legal title or the creation of a new equitable but controlled interest, or the maintenance of effective benefit through the interposition of a subservient agency. Cf. *Gregory v. Helvering*, 293 U. S. 465. "A given result at the end of a straight path," this Court said in *Minnesota Tea Co. v. Helvering*, 302 U. S. 609, 613, "is not made a different result because reached by following a devious path." \* \* \* Taxes cannot be escaped "by anticipatory arrangements and contracts however skilfully devised \* \* \* by which the fruits are attributed to a different tree from that on which they grew." *Lucas v. Earl*, 281 U. S. 111, 115. What Lay gave, Griffiths in reality got, and on that he must be taxed.

And in *Higgins v. Bowers*, decided by the Supreme Court January 8, 1940, the principle is thus stated:<sup>4</sup>

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<sup>4</sup> The decision is found in 1940 C. C. H., Vol. 4, p. 9420; U. S. Law Week, Vol. 8, No. 2, Sec. 4, p. 92 (January 9, 1940).



On the other hand, the Government may not be required to acquiesce in the taxpayer's election of that form for doing business which is most advantageous to him. The Government may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute. To hold otherwise would permit the schemes of taxpayers to supersede legislation in the determination of the time and manner of taxation. *It is command of income and its benefits which marks the real owner of property.* [Italics supplied.]

See also: *Gregory v. Helvering*, 293 U. S. 465.

As to the effect of an assignment to relieve of liability for income taxes, the courts have held that where it is permissible for the property or the rights which produce the income to be assigned, and where they have been in fact assigned, then income thereafter is taxable to the assignee. *Blair v. Commissioner*, 300 U. S. 5; *Nelson v. Ferguson*, 56 F. (2d) 121 (C. C. A. 3d), certiorari denied, 286 U. S. 565; *Kell v. Commissioner*, 88 F. (2d) 453 (C. C. A. 5th); *Hall v. Burnet*, 54 F. (2d) 443, 60 App. D. C. 332, certiorari denied, 285 U. S. 552. But where there is merely an assignment of income to be received, and there has not been or could not be a valid assignment of the rights or property producing the income, then the assignor is still taxable on the income, notwithstanding the assignment. See *Lucas v. Earl*, 281 U. S. 111; *Burnet v. Leininger*, 285 U. S. 136; *Wood v. Commissioner*, 74 F. (2d) 78 (C. C. A. 6th); *Mitchel*

v. *Bowers*, 15 F. (2d) 287 (C. C. A. 2d), certiorari denied, 273 U. S. 759; *Rossmore v. Anderson*, 76 F. (2d) 520 (C. C. A. 2d); *Porter v. United States*, 52 F. (2d) 1056 (C. Cls.); *Brewster v. United States*, 9 F. Supp. 686 (C. Cls.); *Washington v. Commissioner*, 80 F. (2d) 829 (C. C. A. 2d), certiorari denied, 298 U. S. 689. See also *Rosenwald v. Commissioner*, 33 F. (2d) 423 (C. C. A. 7th), certiorari denied, 280 U. S. 599; *Ward v. Commissioner*, 58 F. (2d) 757 (C. C. A. 9th); *Bishop v. Commissioner*, 54 F. (2d) 298 (C. C. A. 7th); *Parker v. Routzahn*, 56 F. (2d) 730 (C. C. A. 6th).

With respect to income from a trust, the same general principles have been followed on the question of the effect of an assignment. Where a beneficiary is restricted in the disposition of the income of a trust he is not relieved of tax liability on assigned income. *King v. United States*, 84 F. (2d) 156 (C. C. A. 1st); *Commissioner v. Blair*, 60 F. (2d) 340 (C. C. A. 7th), certiorari denied, 288 U. S. 602; *Wood v. Commissioner*, 74 F. (2d) 78 (C. C. A. 6th).

The disposition of Congress is to tax all income. As the Supreme Court aptly said in *Heiner v. Colonial Trust Co.*, 275 U. S. 232, at page 235:

The disposition of Congress has been to extend the income tax as far as it can to all species of income, despite immunity from state taxation.  
\* \* \*. Tax exemptions are never lightly to be inferred, \* \* \*.

Compare *Douglas v. Willcuts*, 296 U. S. 1, 9.

In *Blair v. Commissioner*, 300 U. S. 5, relied upon by the taxpayer, the Supreme Court held that the beneficiary who was entitled to the net income of a trust



was the owner of an equitable interest in the property, which interest was "present property alienable like any other, in the absence of a valid restraint upon alienation" (p. 13), and that if he did assign that interest, he was relieved of the tax on the income. There is nothing in the Supreme Court's opinion in that case that would support the conclusion that a beneficiary of a spendthrift trust who attempts to assign the income is relieved of the tax. On the contrary a careful reading of the opinion leads to the opposite conclusion, as shown by the history of that case. In an earlier decision involving, for an earlier year, the same assignment of income of the same trust, the Circuit Court of Appeals for the Seventh Circuit had held that the trust was a spendthrift trust. *Commissioner v. Blair*, 60 F. (2d) 340. The Supreme Court denied a petition for a writ of certiorari in that case, 288 U. S. 602. In the second *Blair* case, *Commissioner v. Blair*, 83 F. (2d) 655, the same Circuit Court of Appeals held—after an Illinois court had construed the will under which the trust was created and had held that it was not a spendthrift trust and that the beneficiary could alienate his interest—that it was bound by a decision of an Illinois court that the trust was not a spendthrift trust but that the purported assignment was merely an assignment of future income and did not relieve the taxpayer of the tax. On review of the second *Blair* case, the Supreme Court (*Blair v. Commissioner*, 300 U. S. 5) rejected the Government's argument that the first decision of the Circuit Court of Appeals was *res judicata* in the second case, and held that the Federal courts were bound by the Illinois decision and that hence the assignment was



effective to relieve the assignor of liability for the tax under previously accepted principles. After reaching these conclusions, the Supreme Court considered the further contention of the Government that in no case does a beneficiary of a trust have anything more to assign than the future income of the trust, and in answer to that contention held that the beneficiary entitled to the income of property held in trust became the owner of an equitable interest in the property, which "interest was present properly alienable like any other, in the absence of a valid restraint upon alienation." (P. 13.)

The holding of the Circuit Court of Appeals in the earlier *Blair* case, in which the trust had been construed as a spendthrift trust, to the effect that the beneficiary of a spendthrift trust is not relieved of the tax by a purported assignment of the income, is clear and, after the denial of certiorari in that case, was undisturbed by the Supreme Court's decision in the second *Blair* case.

The same conclusion that the beneficiary of a spendthrift trust is not relieved of the tax by a purported assignment of the income is supported by the decision of the Circuit Court of Appeals for the First Circuit in *King v. United States*, 84 F. (2d) 156. In that case the court, after pointing out that under certain decisions of the Massachusetts courts and the Supreme Court of the United States a restriction upon alienation of the character of the one there involved was construed as limiting the character of the equitable property so as to make the beneficiary's interest incapable of assignment, said (pp. 158-159):

We think that the clause clearly imposed such a restriction and that the instrument of April 1, 1920, according to its terms and intent, was an attempted assignment made in violation of the restriction.

\* \* \* \* \*

In view of these decisions of the Massachusetts court and of the Supreme Court of the United States, we conclude that, under the law of Massachusetts, income accruing under a trust containing such provisions as are here shown is made incapable of transfer in anticipation of its accrual by an assignment of the beneficiary. The assignment of Alice S. King to her son Henry P. King was invalid; the income accruing from the trust fund during the years 1929 and 1930 belonged to her and was properly taxed to her.

See also: *Byrnes v. Commissioner*, 39 B. T. A. 594.

The fact that the assignment was "honored" by the trustees does not mean, as claimed by the taxpayer, that the trustees recognized that the restraint did not apply to the taxpayer as beneficiary. The trustees might well have honored the assignment as a direction from the beneficiary as to what to do with his income after it had been received by him, just as they might have followed an instruction from him to deposit it to some particular bank account or to deliver it to some particular place or individual for him. The fact that an assignment of income is honored by the parties and followed does not operate to relieve the one entitled to the income, the assignor, from his liability for the tax. The parties may well honor the assignment and make



the payment to the assignee, but for tax purposes the income is treated as if first paid to the one entitled to receive it, the assignor, and then by him paid over to the assignee. See *Lucas v. Earl*, 281 U. S. 111, and *Burnet v. Leininger*, 285 U. S. 136.

In the first *Blair* case, *Commissioner v. Blair*, 60 F. (2d) 340, 341 (C. C. A. 7th), the trustees had "accepted" the assignment and thereafter made payments according thereto to the assignee, and in *King v. United States*, 84 F. (2d) 156, 157 (C. C. A. 1st), the trustees likewise "honored" the assignments, but in both cases the income was held taxable to the assignor.

This is in keeping with the rule that income which is subject to a man's unfettered command may be taxed to him whether he sees fit to enjoy it or not. *Corliss v. Bowers*, 281 U. S. 376, and other cases above.

There is no merit to the claim of the taxpayer that, because under Connecticut law the spendthrift provision as to income payable to himself would not be valid as against creditors, he should not be presumed to have done a "futile" thing by establishing an "invalid spendthrift trust" as to the income payable to himself. As already pointed out, such a trust, while invalid as against creditors, is valid as to the donor and other beneficiaries as to imposed restrictions on disposition of their interest under the trust.

The taxpayer in the instant case did not own the corpus producing the income. He only had a right to receive future payments of income. He could not dispose of that income until after it was paid to him. The income had to go to the taxpayer first, before he could



give it away, and he is not therefore relieved of the tax by an attempted assignment of the income in the future. The purported assignment of the future income by the taxpayer must be treated as a gift of the income *after receipt by him*, since the assignment prior to its receipt was expressly prohibited by the instrument.

It is submitted that the Board correctly held that, because of the restrictive provisions of the instrument, the assignment was inoperative for the purpose of relieving the taxpayer, the beneficiary, from the tax on the income which he purported to assign. Attempts to deflect income falling due in the future are unavailing for tax purposes under the facts and circumstances of this case.

#### CONCLUSION

The decision of the Board of Tax Appeals is correct and should be affirmed.

Respectfully submitted.

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JANUARY, 1940.



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United States Court of Appeals for the  
District of Columbia

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OCTOBER TERM, 1939.

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No. 7548.

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ERNST HUBER,  
PETITIONER,

v.

GUY T. HELVERING, Commissioner of  
Internal Revenue,  
RESPONDENT.

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PETITIONER'S REPLY BRIEF.

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**PETITIONER'S REPLY BRIEF.**

There are only four things in the Commissioner's brief to which any reply seems necessary. They will be discussed under separate headings.

**Point 1.**

The Commissioner's first argument is that "there was no assignment *in fact* in the instant case", and that "no *valid* assignment of trust income was made by the taxpayer" (Br. pp. 6, 7). This is the first time that either of those contentions has been raised in this case. And in the light of the record it is difficult to see how either contention can be seriously made.

To begin with, the Stipulation of Facts agreed upon by the parties, which forms the basis of the Board's findings herein, states not once but *three times* and in *haec verba* that the transfers made by the taxpayer were "assignments", and that the "funds so assigned" are now held by the Trustee as part of the original trust corpus (Stip. IV, VII, VIII; R. 33-34). We do not see how the Commissioner's counsel can now repudiate those statements of fact, which have never been in dispute.

In the second place, the two transfers of March 18, 1933 and March 3, 1934, as well as the prior transfer of December 31, 1932, have all been *recognized and accepted* as *assignments* by the Bridgeport City Trust Company, Trustee, *ever since they were made* (Stip. IV, V, VI; R. 33-34). They have been accepted as assignments by the beneficiaries of the trust by their acquiescence therein (Stip. III; R. 33); and the Donor of the trust, Mr. Huber, has recognized and demonstrated that he was bound by said assignments by his conduct in abiding by the terms thereof and raising no question as to the right of the Trustee to hold the funds in question for the benefit of Donor's wife and children.

In the third place, the Trustee ever since the assignments were made, has dealt with said funds solely as trust property; has administered said funds under the terms of the original trust agreement, has reported the income from said funds as trust income and has paid income taxes thereon (Stip. III; R. 33).

In the face of all these facts of record, will the Commissioner's counsel still contend that "there was no assignment *in fact* in this case?"

\* \* \* \* \*

Next, the Commissioner proceeds to argue that "no *valid* assignment of trust income was made by the taxpayer" (Br. p. 6). Well, why not? What does it take to make a valid assignment or transfer of trust property?

According to *Bouvier* an assignment is "a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein. \* \* \* A transfer by writing as distinguished from one by delivery."

No formality in language, or in style, or in execution is required to constitute a valid assignment. *Ormond v. Conn. Mutual Life Ins. Co.*, 145 N. C. 140, 58 S. E. 997. As the Court said in that case: "No particular form of words is essential to effect an assignment of a policy of insurance."

An assignment may take any form or language the assignor may choose which shows a clear intent to transfer the property or some right or interest therein. *Brown v. Smith*, 13 N. D. 580, 102 N. W. 171. A more complete statement of the rule is found in 5 *C. J. Assignments*, Sec. 73, where it is said:

"Any language however informal if it shows the intention of the owner of the chose in action to transfer it, will be sufficient to vest the property therein in the assignee. It may be *in the form of an order* on the debtor or holder of the fund to pay the debt or the fund to another." Citing cases from all jurisdictions.

With these principles in mind let us look at the transfers before us. What do they say?



"I hereby *authorize* and *instruct* you to *charge* income account on trust established by me under date of March 4, 1931, for the balance of income as shown thereon as of the present date. I further authorize and instruct you to *credit such amount to the principal of said irrevocable trust fund.*"

"This is to *instruct* you to *make* the following transfers from income to principal \* \* \*

That language gave the Trust Company as Trustee the authority and right to add said funds to the trust principal. That language constituted a positive *order* upon the Trust Company to add the funds in question to the original trust corpus. The Trust Company was already acting as Trustee under the taxpayer's original trust. It already had the authority to receive and accept additions to the original trust. The taxpayer had the right to make such additions. What more positive language could the taxpayer have used to authorize and direct the Trust Company which held the trust income, to add those funds to the already existing trust? In other words, we can not lose sight of the circumstances in this case, the position of the parties which made such an assignment the most natural thing to be done. The Trust Company as Trustee held the income of the trust. Why not direct the Trustee to transfer such funds to the principal of the trust? What could be simpler and more natural under the circumstances?

\* \* \* \* \*

The Commissioner contends that the assignments in question "must have the essential elements of a contract", in order to be valid. But such is not the law. The reasons are as follows:

1. "The creation of a trust is not strictly speaking either a conveyance or a contract, but is a disposition of property in the nature of a conveyance of the beneficial interest." *Scott on Trusts*, Sec. 40.1.

2. A declaration of trust or an addition to an existing trust does not require consideration. *Scott on Trusts*, Sec. 17.1 and Sec. 28.

3. No particular method or language is necessary. *Scott*, Sec. 24.

4. No communication to the beneficiary is necessary. *Scott*, Sec. 24.2.

5. No acceptance by the beneficiary of such an assignment is necessary. *Scott*, Sec. 36.

\* \* \* \* \*

The Commissioner next argues that a "letter of direction" is not an assignment. We have never made such a contention. But an assignment may *take the form of a letter* just as effectually as any other form. As stated in *Bouvier*, "Assignments", p. 92: "A mere note or memorandum is sufficient to constitute an assignment of personal property." The same rule is stated in 5 *C. J. Assignments*, Sec. 73, Note 97(b).

The case of *Lust v. Miller*, 4 F. (2d) 293, cited in respondent's brief, has literally no bearing whatever on this case. *Lust v. Miller* has nothing to do with trusts, trust funds or trustees. It was not an assignment of property by the donor to a trust, which as we have shown above does not require consideration, consent

or even the knowledge of the beneficiary. The transaction in the *Lust case* was a simple assignment by the debtor to the creditor which naturally requires the assent of the creditor to make it valid.

\* \* \* \* \*

The Commissioner next contends that the assignments in question were not valid assignments because "there is no designated assignee". The error of that is too patent to require argument. The assignments here were on their face transfers to the Ernst Huber Trust, and said so. They were directed to the Bridgeport City Trust Company as Trustee under *that trust*. The taxpayer's wife and children were the beneficiaries under that trust. The Bridgeport City Trust Company as Trustee was the assignee. The Commissioner's contention is meritless on its face.

## Point 2.

The second point raised in Commissioner's brief (p. 9) is that the transfers in question "did not create new, irrevocable trusts" because there was "*no power in the Donor to create new trusts or add to the corpus of the old trust until the trust income had first been distributed to him.*"

The answer to that is so plain that we hesitate to take the time of this Court in discussing it again. That phase of the case is covered completely in taxpayer's original brief, pages 18 to 25. It can be summed up in three simple propositions of law, all of which have received the sanction of the Supreme Court, to wit:



1. One who has the right under the terms of a trust to receive the net income during his lifetime, becomes the owner of an equitable interest in the corpus of the trust property. That is an exact summation of the decisions of the Supreme Court in *Brown v. Fletcher*, 235 U. S. 589; *Irwin v. Gavit*, 268 U. S. 161; *Senior v. Braden*, 295 U. S. 422.

2. That right or interest in the trust income is present property alienable like any other property. *Commissioner v. Field*, 42 F. (2d) 820; *Shanley v. Bowers*, 81 F. (2d) 13; *Blair v. Commissioner*, 300 U. S. 5.

3. The assignment of such an interest is not the assignment of a chose in action, but of the right, title and interest in and to property. *Brown v. Fletcher*, *supra*; *Senior v. Braden*, *supra*; 1 *Bogert Trusts*, Sec. 183.

These three propositions of law and the cases above cited are discussed, affirmed and followed by the Supreme Court in *Blair v. Commissioner*, 300 U. S. 5, where the Supreme Court added this point:

4. If such an interest in the trust income is assigned or transferred, the assignees "become the owners of the specified interests in the income, and as to those interests they and not the petitioner were taxable for the years in question."

The fundamental error of the Commissioner's counsel throughout this entire case has been his failure to comprehend this fact, that Mr. Huber's *right* to receive the income of the trust was an *equitable interest* in the *corpus* of the trust, which interest Mr. Huber could as-

sign or transfer at will. Up to the very last page of his brief Commissioner's counsel makes it plain either that he has not yet apprehended that distinction or is not willing to admit it.

As an illustration of this the Commissioner argues in his brief, pages 9 and 10, that the taxpayer could not create a trust of his right to receive the income because "a trust can not be established in personal property not owned by the donor at the time of the declaration of trust, but which is to be acquired in the future, such as future profits." (Citing *Brainerd v. Commissioner*, 91 F. (2d) 880.

Why make such an argument in the face of *Blair v. Commissioner*, *supra*, and all the cases cited therein holding squarely that a right to receive the income of a trust "is present property alienable like any other property"? The *Brainerd* case was one where the donor attempted to create a trust out of such profits as he *might* make out of certain Stock Exchange transactions to be entered into in the future. In other words, the subject matter of the trust was not then in existence. Naturally that case has no application here, where Mr. Huber's *equitable interest* in the trust existed from the instant the trust was created, whether any income was earned by the trust or not.

There are any number of Federal cases holding that the income *from property* may be assigned prior to being earned, and that such an assignment subjects the assignee to taxation thereon, and not the assignor. The coupons on bonds representing interest yet to be earned can be assigned and relieve the owner of the bonds from income taxation on such bond interest.

*Horst v. Commissioner*, 107 F. (2d) 906; *Rosenwald v. Commissioner*, 33 F. (2d) 423. Dividends on stocks may be assigned prior to their payment, thereby relieving the assignor from income taxation thereon. *Matchette v. Helvering*, 2 Cir., 81 F. (2d) 73.

It has also been held that a taxpayer may assign to another the income to be earned from real estate over a limited period of years, and so long as the assignee is entitled to the income under the terms of the assignment he is taxable thereon, and not the grantor. *United States v. First Nat'l Bank of Birmingham*, 74 F. (2d) 360.

The same is true of an assignment of the income from securities for a limited period of years. *Meredith S. Wood*, 104 F. (2d) 1013.

\* \* \* \* \*

Next, the Commissioner argues that the transfers in question were not *irrevocable* (Br. p. 9). No reasons are given and no cases are cited to support the Commissioner's statement. He simply says they were not irrevocable.

We have already covered this point in petitioner's original brief, pages 19 to 22 and pages 27 to 31, with citations of abundant authority. We have pointed out that the irrevocable character of the assignments in question was shown by the following:

1. The language of the assignments themselves, indicating a clear intention of the Donor to transfer his equitable interest and right to receive the income of the trust.



2. The conduct of the parties to the transaction, showing that the Donor had considered and treated the assignments as absolute and irrevocable ever since they were made; that the Trustee had accepted the assignments, had added the funds in question to the corpus of the trust and had made the necessary entries and transfers on its books, had reported the income in its tax returns as trust income and paid taxes thereon; and that both parties have since dealt with the funds in question as trust property, and the taxpayer has never had any part thereof paid or credited to him, and has done nothing to repossess or revest in himself any part of said funds.

3. That transfers almost identical in terms with the two transfers in question have been sustained by the Board of Tax Appeals and by the Circuit Courts of Appeal in the following cases:

*Yolande v. Perkins*, 38 B. T. A. 189.

*Edith H. Blaney*, 13 B. T. A. 1315.

*Ellen S. Booth*, 36 B. T. A. 141.

*Meredith Wood*, 37 B. T. A. 1065, Affirmed (C. A. 2) 104 F. (2d) 1013.

*Byrnes v. Com* 110 F (2) 294

We can now add a fourth argument as to the irrevocable character of these assignments. As a matter of law an assignment of property to a trust is presumed to be irrevocable and absolute unless some power of revocation is reserved. *Scott on Trusts*, Sec. 330.1 and Sec. 330.2. Professor Scott there says:

“Ordinarily the inference is that the trust is *irrevocable* unless an intention to reserve a power of revocation can be gathered from the language used by the settlor or from the character of the trust or from the circumstances of its creation.”

This is the rule in the Federal Courts as well. *Hughes v. Commissioner*, 104 F. (2d) 144.

In addition to that, it is worth noting that the transfers in question were not isolated transactions standing alone—"unrelated to nothing". These assignments were:

- (a) Directed to the Trustee of the original trust;
- (b) The subject matter, to wit, trust income, arose out of the original trust, and was already under the Trustee's control; and
- (c) The assignments were related by name to the corpus of the original trust by specific order that the income should be added to the original trust.

In view of the above facts it seems obvious that these assignments must be construed *in their relation to the original trust* instrument of March 4, 1931, which the Commissioner has throughout conceded to be an irrevocable trust (Br. p. 4).

### Point 3.

The third point raised in the Commissioner's brief is that this "was a spendthrift trust and the provisions prohibiting alienation of the interest of any beneficiary were binding on the taxpayer."

The argument of the Commissioner runs thus:

Major premise. The spendthrift clause in Article Sixth is applicable to all persons benefited by the trust.

Minor premise. The taxpayer was the life beneficiary of the income.

Conclusion. Therefore, the taxpayer was prohibited from alienating his interest in the trust income.

The flaw in the argument lies, of course, in the major premise. The spendthrift clause embodied in Article Sixth is *not* applicable to *all* the persons benefited by the trust, but applies only to those *specifically designated* as *beneficiaries*. A single reading of the trust instrument makes that clear. A second reading makes it too plain for argument.

We have covered this point fully in petitioner's original brief, pages 6 to 12. It is quite significant that the Commissioner does not even attempt to answer petitioner's brief on this point; *i. e.* as to the *correct construction* of the trust instrument. In other words, the petitioner's contention that Mr. Huber *did not intend* to have the spendthrift clause apply to him as Donor, remains completely unanswered by the Commissioner's brief. If Mr. Huber did not *intend* himself to be covered by the spendthrift clause, then certainly no court will compel him to be covered by it against his own intention.

The Commissioner confines his argument on this point to the proposition that Mr. Huber as a matter of law had the *power* to make himself a beneficiary of a spendthrift trust of his own creation. The Commissioner cites *Ruling Case Law*, Vol. 25, Sec. 6, as his authority.



Obviously counsel for Commissioner has misconstrued the meaning of that section of R. C. L. That section is devoted entirely to a consideration of trusts created to protect trust property from *creditors*, and has no application to *restraints upon alienation* by the donor. If counsel will examine the cases cited in support of Sec. 6, R. C. L., he will find that none of them deals with restraints upon alienation by the donor of a trust. This is made quite clear in a very recent decision by the Circuit Court of Appeals in *Hughes v. Commissioner*, 104 F. (2d) 144, where the Court said:

“Respondent contends that since there was a ‘spendthrift trust’ provision in each instrument prohibiting alienation of the interest of any beneficiary, the taxpayer’s interest could have no value because it could not be transferred. Respondent’s contention is not sound, however, because such a ‘spendthrift trust’ provision, in Massachusetts, California, and generally, is invalid as to the creditors of the trustor. 1 Bogert, Trusts and Trustees, p. 7, 730, sec. 224; 1 Restatement of the Law of Trusts, p. 386, sec. 156; 65 C. J. 239, 240, sec. 27. *Therefore, his prospective right to the income upon the occurrence of certain events, was capable of alienation.*”

An even more comprehensive statement of the rule is found in *Scott on Trusts*, Secs. 156 and 156.1, cited in petitioner’s original brief, pages 13 and 15. Professor Scott states the doctrine as follows:

“Sec. 156. *Where the settlor is a beneficiary.* Even in jurisdictions in which spendthrift trusts are permitted, the settlor cannot create a spendthrift trust for his own benefit. If the owner of property transfers it in trust to pay the income to himself for life or for a period of years, and provides that his interest under the trust *shall not*

*be assignable by him and that his creditors shall not be permitted to reach it, nevertheless he can effectively assign his interest, and his creditors can reach it. It is immaterial that in creating the trust the settlor did not intend to defraud his creditors. It is immaterial that he was solvent at the time of the creation of the trust. It is against public policy to permit a man to tie up his own property in such a way that he can still enjoy it but can prevent his creditors from reaching it."*

The same rule is stated in *Griswold on Spendthrift Trusts*, Sec. 471. The doctrine is supported by numerous cases from practically every State.

Professor *Scott* reiterates the rule with almost exact application to this case in Sec. 156.3 where he says:

"Ordinarily there is no difficulty in determining whether a beneficiary is also the creator of the trust. Where the owner of property gratuitously transfers it in trust, he is the settlor. If he has an interest as a beneficiary of the trust, his interest can be reached by his creditors and *can be assigned by him, even though it is otherwise provided by the terms of the trust.*"

\* \* \* \* \*

The next argument of the Commissioner is that "the taxpayer as a *designated beneficiary* was bound by the restrictions provided in the trust instrument \* \* \* and therefore he could not make a valid assignment of the income".

The above statement of counsel that the taxpayer was a "*designated beneficiary*" is obviously an oversight of counsel as to the facts in the case, which we can not allow to go unchallenged. Taxpayer was *not* a designated beneficiary of the trust. The trust instru-



ment designated Mr. Huber as the *Donor* of the trust and as nothing else. Mr. Huber is referred to at least twenty times in the trust instrument, but always as the *Donor*—*never* as a beneficiary.

In *King v. United States*, 84 F. (2d) 156, relied upon so heavily by the Commissioner, the taxpayer was *not* the donor of the trust; he was a *designated beneficiary* of a spendthrift trust. He attempted to assign his interest to another. Naturally the Court held that such an attempted assignment was invalid.

#### Point 4.

The final argument of the Commissioner, so far as we understand it, is apparently that after all this was merely an assignment of future income, and that the income was always subject to taxpayer's unfettered command—hence, argues the Commissioner, the case is governed by *Lucas v. Earl*, *Corliss v. Bowers*, *Gregory v. Helvering*, and what have you.

Such a mixing of unrelated legal principles in one argument is very difficult to straighten out. The idea that this was merely an assignment of future income has no support whatever from the facts. This is not the case of an assignment of personal earnings (*Lucas v. Earl*, 281 U. S. 111; *Rossmoore v. Commissioner*, 76 F. (2d) 520); nor of an assignment of taxpayer's partnership earnings (*Burnet v. Leininger*, 285 U. S. 136); nor was it an agreement to turn over certain income from securities as and when received by the taxpayer (*Rosenwald v. Commissioner*, 33 F. (2d) 423; *Porter v. United States*, 52 F. (2d) 1056).



This was not the creation of a trust to take care of taxpayer's marital obligations (*Douglas v. Willcuts*, 296 U. S. 1).

This is not the case of an assignment of trust income by a beneficiary who is restricted by the terms of the trust in the disposition of the trust property, and who assigns subject to that restriction. *Wood v. Commissioner*, 74 F. (2d) 78; *King v. United States*, 84 F. (2d) 156.

This case has nothing to do with a reorganization, or the setting up of a sham corporation to siphon off the profits of a business. *Gregory v. Helvering*, *supra*; *Minnesota Tea Co. v. Helvering*, 302 U. S. 609. This case does not involve tax avoidance in any sense of the term, and the assignments in question were not made for tax purposes or to reduce the taxpayer's income. *Griffiths v. Helvering*, .... U. S. ...., 1940 C. C. H. p. 9342.

The case *does involve* a simple transfer or assignment of taxpayer's right to receive the income from a trust over a period of years. It is precisely the same sort of transfer that was before the Court and the Board of Tax Appeals in *Blair v. Commissioner*, *supra*; *Yolande v. Perkins*, *supra*; *Edith H. Blaney*, *supra*; *Grace S. Clark*, 16 B. T. A. 453; and *Ellen S. Booth*, *supra*. The assignment in each one of those cases was sustained as an irrevocable assignment of an interest in the trust which relieved the assignor from taxation thereon.

We respectfully submit that the transfers in question constituted irrevocable assignments of taxpayer's

right to receive the income from the trust during the years in question, and transferred that right to the Trustee for the sole use and benefit of the trust; that the trust has become the owner of said funds and hence should be taxable thereon. As a matter of fact the trust has *already paid the taxes upon the income in question.*

Respectfully submitted,

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